86 1649

CASE NO.

Supreme Court, U.S.
FILED
APR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF OHIO; THE OHIO DEPARTMENT OF AGRICULTURE; DALE LOCKER, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE; ERIC NELSON, HARDIN COUNTY BEE INSPECTOR,

Appellants,

v.

WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER d/b/a SUNNYSIDE BEE FARM; ELMER STEINER AND MARILYN L. STEINER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

PETER D. PATITSAS
Assistant Attorney General

* **PATRICK ANDREW DEVINE**
Assistant Attorney General

State Office Tower, 10th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2980

* **COUNSEL OF RECORD FOR APPELLANTS**

QUESTION PRESENTED

WHETHER A STATE IS PROHIBITED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FROM CONDUCTING NONCONSENSUAL, WARRANTLESS ADMINISTRATIVE INSPECTIONS OF PROPERTY SUCH AS AN APIARY.[1]

---

[1]O.R.C. Section 909.01 (D) defines an apiary as "any place where one or more colonies or nuclei of bees are kept."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
DECISIONS BELOW 1
STATEMENT AS TO JURISDICTION 1–
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
GROUNDS FOR PLENARY CONSIDERATION 6
CONCLUSION 15
CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page

Cases:

Allinder v. State of Ohio,
614 F. Supp. 282 (N.D. Ohio 1985) 1, 9, 11

Cady v. Dombrowski,
413 U.S. 433 (1973) 13

Camara v. Municipal Court,
387 U.S. 523 (1967) 10

Carroll v. United States,
267 U.S. 132 (1925) 10

Hester v. United States,
265 U.S. 57 (1924) 7

Illinois v. Krull,
481 N.E.2d (1985),
cert. granted 106 S.Ct. 1456 (1986) 13, 14

Katz v. United States,
389 U.S. 347 (1967) 10

Maine v. Taylor,
106 S. Ct. 2440 (1986) 1

New York v. Burger,
493 N.E.2d 926 (1986),
cert. granted 107 S.Ct. 61 (1986) 13, 14

Oliver v. United States,
466 U.S. 170 (1984) 7, 8

Smith v. Maryland,
442 U.S. 735 (1979) 6

Constitution of the United States:

Amendment IV 2, 3, 5-7, 10

United States Code:

28 U.S.C. §1254(2) 1, 12

28 U.S.C. §2103 15

Ohio Revised Code:

§909.01-.05 ..... 3-5, 11

§909.99 11

TABLE OF AUTHORITIES *cont'd*

Page

Other Authorities:

Honey Bee Pests, Preditors, And Diseases, Appendix 3 (R. Morse ed., Cornell University Press, 1978)..... 11, 12

DECISIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (App. A, p. A-1) is unreported. The memorandum and order of the United States District Court for the Northern District of Ohio (App. B, p. A-24) is reported at 614 F. Supp. 282. The findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio is unreported (App. C, p. A-38).

STATEMENT AS TO JURISDICTION

The judgment below was entered on January 8, 1987 (App. A, p. A-1). The notice of appeal was filed on March 20, 1987 (App. E, p. A-54). This appeal was docketed within 90 days of the judgment of the Court of Appeals. The jurisdiction of this Court rests on 28 U.S.C. §1254(2). The validity of a State statute has been drawn into question on the ground of being repugnant to the United States Constitution. The decision below was against the validity of the statute.

In *Maine v. Taylor,* 106 S. Ct. 2440, 2446 (1986), the Court stated (footnote omitted):

> Section 1254(2) serves to ensure that a state statute is struck down by the federal judiciary only when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court. Federal nullification of a state statute is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution, and review by this Court is particularly warranted in either event.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,....

STATUTES INVOLVED

The statutes involved are set forth in Appendix F, p. A-56.

STATEMENT OF THE CASE

This appeal is brought by the State of Ohio; the Ohio Department of Agriculture; Dale Locker, Director of the Ohio Department of Agriculture; and Eric Nelson, Hardin County Bee Inspector.[2] This appeal challenges the judgment of the United States Court of Appeals for the Sixth Circuit that a law of the State of Ohio, Ohio Revised Code §909.05, is unconstitutional under the Fourth Amendment to the Constitution of the United States. Ohio Revised Code §909.05 permits the Ohio Department of Agriculture to conduct nonconsensual, warrantless inspections of apiaries. In the United States Court of Appeals for the Sixth Circuit, a 2-1 majority of the Court affirmed the decision of the district court that a nonconsensual, warrantless inspection of an apiary constitutes an unreasonable search under the Fourth Amendment.

The statute which the Court of Appeals invalidated is part of the Ohio Apiary Inspection Program set out in Chapter 909 of the Ohio Revised Code. Ohio Revised Code § 909.02 requires each beekeeper to file with the Ohio Department of Agriculture (hereinafter "ODA") an application for registration setting forth the exact location of his apiaries and the number of colonies of bees in each apiary. Through this annual registration process, ODA arranges the systematic inspection of apiaries by geographic area. The purpose of the Ohio Apiary Inspection Program is to inspect for bee diseases, particularly

---

[2]The United States Court of Appeals for the Sixth Circuit remanded this case to the district court with instructions to dismiss the State of Ohio and the Ohio Department of Agriculture as defendants for lack of jurisdiction. This appeal by the State of Ohio and the Ohio Department of Agriculture does not indicate a waiver of the Eleventh Amendment as an affirmative defense.

American foulbrood disease (hereinafter "AFB").

Although AFB poses no threat to humans, it is a highly contagious and serious disease for bees. The Ohio General Assembly has determined that "infected bees, hives, honey and appliances are a public nuisance." Ohio Revised Code §909.03. Accordingly, the Director of Agriculture has been granted broad authority "to control, eradicate, or prevent the introduction, spread, or dissemination of dangerous bee diseases." *Id.* In addition, the Director of Agriculture may impose quarantines to control, eradicate, or prevent the spread of disease. Ohio Revised Code §909.04.

The goal of the Ohio Apiary Inspection Program is to inspect each apiary annually. However, because of the limited funding in certain counties and the time limitations imposed by the seasonal nature of the inspection program and the need for favorable weather conditions, ODA each year inspects the apiaries of approximately eighty-five to ninety percent of the beekeepers. Priority is given to those apiaries which have been quarantined and to those which were not inspected in the prior year.

The Allinders and the Steiners are commercial beekeepers who raise bees for honey production and crop pollination. The Allinders own 600 hives and the Steiners own approximately 850 hives, all of which are located in seven northwest Ohio counties. In the instant case, ODA informed the Allinders and the Steiners of a planned warrantless inspection of their apiaries. Subsequently, the Allinders and the Steiners commenced separate actions for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio. Among other ~~things~~, the Allinders and the Steiners challenged the constitutionality of Chapter 909 of the Ohio Revised Code, which permits the inspection of apiaries

without the requirement of a warrant or consent. The district court granted the Allinders' motion for partial summary judgment and permanently enjoined ODA from conducting warrantless, nonconsensual inspections of apiaries. The parties in the *Steiner* action stipulated that the order entered in the *Allinder* case would apply in the *Steiner* action, and that the two actions would be consolidated.

The State defendants appealed the decision of the district court. On January 8, 1987 the United States Court of Appeals for the Sixth Circuit held Ohio Revised Code §909.05 unconstitutional under the Fourth Amendment and affirmed the decision of the district court in substantial part.

GROUNDS FOR PLENARY CONSIDERATION

The question presented is substantial.

1. THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT NONCONSENSUAL, WARRANTLESS ADMINISTRATIVE INSPECTIONS WHERE THERE IS NO REASONABLE EXPECTATION OF PRIVACY. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN PROPERTY SUCH AS AN APIARY LOCATED IN THE OPEN FIELDS.

The courts below determined incorrectly that there is a reasonable expectation of privacy in an apiary. The apiaries were placed in the open fields with the owners' full knowledge that they were subject to inspection. Further, there is no substantial privacy interest in personal property such as a beehive which contains only the things expected—bees, larvae, and the like.

The Fourth Amendment of the United States Constitution provides in part for "people to be secure in their persons, houses, papers and effects against unreasonable searches ..." It is important to note that the Fourth Amendment does not constitute an absolute bar against warrantless searches by state officials. Rather, "...the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable', 'reasonable' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland,* 442 U.S. 735 (1979) at 740.

Since the apiaries in the instant case were located in the open fields, the lower courts erred in holding that the "open fields doctrine" did not apply. As Judge Engel noted in his dissenting opinion in this case before the United States Court of Appeals for the Sixth Circuit at 17:

> There is nothing in the record to suggest that the hives in question were within the curtilage or within any other outbuilding to which any independent expectation of privacy protectable under the Fourth Amendment might have attached.

Accordingly, this case comes within the ambit of the "open fields doctrine."

The "open fields doctrine" was first enunciated by the United States Supreme Court in *Hester v. United States,* 265 U.S. 57 (1924), and was reaffirmed in *Oliver v. United States,* 466 U.S. 170 (1984). In *Hester,* this Court stated that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects', is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226." 265 U.S. at 59. As this Court stated in *Oliver* at 178-179:

> In this light, the rule of *Hester v. United States, supra,* that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. . .[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and police in ways that a home, an office or commercial structure would not be ... for these reasons the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

According to the reasoning of this Court in *Oliver*, the Allinders and Steiners cannot assert a reasonable expectation of privacy in their apiaries. This is so since these apiaries are located in the open fields which "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Id.* at 179. Just as there is no societal interest in protecting the privacy of the cultivation of crops, there is no societal interest in protecting the privacy of the raising of bees. Just as an individual may not legitimately demand privacy for cultivating crops out of doors in fields, an individual may not legitimately demand privacy for raising bees out of doors in fields. Apiaries are not places in which any sort of human relationships take place. Thus, apiaries can be distinguished both from the home and even from commercial establishments in which human relationships take place. The expectation of privacy which the Allinders and Steiners have asserted is simply not an expectation that society recognizes as reasonable. Accordingly, ODA should not be compelled to acquire either a warrant or consent to inspect apiaries in the open fields.

In addition, neither the Allinders nor the Steiners can assert even a subjective expectation of privacy with respect to their apiaries. The record here indicates that ODA provided prior notice of the challenged inspections to both the Allinders and Steiners. Even before this time they were well aware of the fact that their apiaries were subject to inspection for dangerous bee diseases. At the injunction hearing held in the United States District Court for the Northern District of Ohio, Mr. Allinder stated that for several years he had been placing language on his apiary registration form indicating that he would not permit any inspection of his apiaries without a warrant. Before Mr. Allinder placed such language on his registration form, his apiaries were inspected every year from

1973 through 1980. Mr. Allinder can be attributed with knowledge of these inspections because of the notices he received both before and after the inspections. Mr. Allinder further testified that the registration form requested the county and township where the apiaries are located and that the form provided a space in which to give directions as to how to locate the apiaries.

It is clear that the Steiners also were well aware that their apiaries were subject to inspection for dangerous bee diseases. At the May 9, 1984 Preliminary Injunction Hearing in *Allinder v. State of Ohio,* Case No. C84-7395, Mr. Steiner was asked the following: "To your knowledge are your apiaries subject to inspection by the State of Ohio, Department of Agriculture?" Mr. Steiner responded, "They are, they're registered for that purpose." Accordingly, neither the Allinders nor the Steiners had even any subjective expectation that their apiaries would not be inspected by ODA.

Independent of the fact that the apiaries were located in the open fields, there is no substantial privacy interest and hence no reasonable expectation of privacy in property such as an apiary. This is so since a beehive can contain only the things one would expect—bees, larvae, and the like. As Judge Engel stated in his dissenting opinion in this case in the United States Court of Appeals for the Sixth Circuit at 21:

> And unlike a container which may mask its contents and which may provide an aura of privacy for uncertain contents, here one finds exactly what one would expect. I therefore do not equate the hive to some type of luggage or other container which might potentially contain a wide variety of objects, some of which might be of a personal nature.

It is not reasonable for a person to assert a privacy interest in objects which are not of a personal nature. As stated by this Court in the case of *Camara v. Municipal Court,* 387 U.S. 523 (1967) at 539, reasonableness is still the ultimate standard.

The majority opinion below maintains that since an apiary can be considered personal property and an "effect" within the meaning of the Fourth Amendment, an apiary is protected by the Fourth Amendment against warrantless searches. However, neither the distinction between personal property and real property nor the determination that property is an "effect" are determinative with regard to the requirement of a warrant or consent to conduct an inspection. As the dissenting opinion in the case below noted at 20:

> Beehives are no doubt personal property but the law is clear that the amendment protects people and not property. *Katz,* 389 U.S. at 347. Not all effects are protected by the Fourth Amendment against warrantless searches and not all real property is unprotected. *Carroll v. United States,* 267 U.S. 132, 151 (1925) (upholding warrantless search of automobile while suggesting that a warrant would be required to search a dwelling) ...Thus, the real question is whether a beehive is the kind of effect to which there attaches a reasonable expectation of privacy.

As previously stated, there is no substantial privacy interest in a beehive. A beehive is not a place where any kind of human relationships take place, and it is not customary to conceal anything of a personal nature in a hive. Accordingly, there is no reasonable expectation of privacy with respect to an apiary.

Further, the pervasive regulation of the apiary industry indicates that there is no reasonable expectation of pri-

vacy. This pervasive regulation puts beekeepers on notice of the prospect of ODA's inspections. Under Ohio Revised Code §909.02, each beekeeper must register his apiaries with ODA annually. The purpose of the registration process is to provide information to assist the inspection program. The statutory scheme provides a penalty for failing to register. Ohio Revised Code §909.99. In order to increase compliance, ODA sends letters and encourages its county inspectors to make personal visits to beekeepers.

The record indicates that ODA attempts to inspect each hive once a year. However, because of the time limitations imposed by the seasonal nature of the inspection program and the need for favorable weather conditions, ODA each year inspects the apiaries of approximately eighty-five to ninety percent of the beekeepers. Priority is given to those apiaries which have been quarantined and to those which were not inspected in the prior year.

The pervasive regulation of the apiary industry is further indicated by the fact ODA has been registering and inspecting apiaries since the 1930's. *See* July 19, 1985 Memorandum and Order at 7. Also, all 50 states have established apiary inspection programs in order to detect bee diseases.[3] Since the apiary industry is pervasively regulated, there is no reasonable expectation of privacy in the contents of the hives.

Plenary consideration of the decision below is necessary to review what the appellants believe to be a clear error of law with regard to the scope of the warrant

---

[3]*See Honey Bee Pests, Preditors, and Diseases,* Appendix 3 (R. Morse ed., Cornell University Press, 1978).

requirement in administrative inspections. Since there are numerous state and federal agencies which conduct administrative inspections, the impact of the decision in this case will be substantial and far-reaching.

The appeal taken in this case is pursuant to 28 U.S.C. §1254(2). Such an appeal to this Court is considered an appeal as of right and any disposition of this case is an ultimate disposition of the case on the merits. Accordingly, a decision of this Court to deny plenary consideration of this case would have a substantial impact on the question of the requirement of a warrant in administrative inspections.

It is important to note that all 50 states have established apiary inspection programs. Any decision in this case will have a direct impact on the procedures utilized in these inspection programs. This is especially true since approximately 46 of the state statutes provide the respective departments of agriculture the right to enter the premises to inspect apiaries, and these statutes provide for no restrictions with regard to the requirement of a warrant or consent.[4] A decision in the instant case has the potential to revolutionize and disrupt the apiary inspection process throughout most of the country. The question presented, therefore, is certainly substantial.

Plenary consideration of the instant case is important not only because of its precedential impact in the area of administrative inspections, but also because of its precedential impact in the area of even criminal-type searches. The majority opinion in the case below noted the following at p. 9, n. 9:

---

[4]*See id.*

> The case closest to the circumstances involved here is *Cady v. Dombrowski,* 413 U.S. 433 (1973). *Cady* involved an automobile which had been parked in a field. After viewing a bloody interior of the car through a window, a police officer obtained a search warrant. The search turned up a bloody sock and floor mat. The defendant argued that the search was illegal because the two items were not particularly described in the warrant. The Supreme Court upheld the search on the basis of the warrant and added, "We therefore need not reach the question of whether...a search of the back seat of this car, located as it was in an open field, required a search warrant at all." *Id.* at 449-50...

The majority opinion in the case below points out correctly that a case relating to a criminal search can be analogized to a case dealing with an administrative inspection. If a warrant is required to inspect an apiary located in an open field, even though an apiary does not contain anything of a personal nature, then a warrant will be required to search an automobile found in an open field, since an automobile often does contain belongings of a personal nature. Such a requirement would be overly burdensome not only in the area of administrative inspections and particularly in the inspection of apiaries, but also in the area of law enforcement. Therefore, the decision in this case will affect both administrative inspections and searches in the area of law enforcement.

That the issues presented in this case are substantial is demonstrated by this Court's decision to grant certiorari in two other cases dealing with statutes permitting warrantless administrative inspections. These cases are *New York v. Burger,* 493 N.E.2d 926 (1986), cert. granted 107 S.Ct. 61 (1986), and *Illinois v. Krull,* 481

N.E.2d 703 (1985), cert. granted 106 S.Ct. 1456 (1986).

Although the above cases pertain to administrative inspections and the decisions therein may have a bearing on the instant case, these decisions will not be dispositive of the issues in the instant case. Neither *Burger* nor *Krull* present facts where the inspections authorized by statute pertained to property located in the open fields, such as crops or apiaries. These cases deal instead with the warrantless inspections of business records, vehicles, and vehicle parts. An apiary, unlike a business record or a vehicle, does not contain anything of a personal nature. The reasonable expectation of privacy in an apiary is very different from the reasonable expectation of privacy in business records or a vehicle.

Further, in the *Burger* case the Court of Appeals of New York pointed out two defects in the statutory scheme. First, the true purpose of the authorized inspections was to uncover evidence of criminality rather than to conduct legitimate administrative inspections. Second, police officers, rather than agents of the regulatory agency, were authorized to conduct the warrantless inspections. Neither of these defects enunciated by the court in *Burger* are applicable in the instant case. Here, the inspections are conducted by agents of ODA for the legitimate purpose of controlling bee diseases in Ohio. Accordingly, the issues in the instant case are not identical to those in *Burger.*

In short, the issues presented for review are substantial in that their resolution will affect the law evolving in the area of warrantless inspections and searches. There are numerous state and federal agencies who need clear guidance with regard to the parameters of their right to inspect without a warrant.

CONCLUSION

For the reasons stated herein, this Court should note probable jurisdiction and grant this case plenary consideration. If, however, the Court believes that it lacks jurisdiction either to hear the case on appeal or to reverse summarily, the question presented is nevertheless important, and certiorari should be granted under 28 U.S.C. §2103.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

PETER D. PATITSAS
Assistant Attorney General

* **PATRICK ANDREW DEVINE**
Assistant Attorney General

State Office Tower, 10th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2980

* **COUNSEL OF RECORD FOR APPELLANTS**

April, 1987

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Jurisdictional Statement have been sent by first-class U.S. Mail, postage prepaid, on this _____ day of, _____ 1987, to: Gregory L. Arnold, Arnold and Barrett, Suite 804, Secor Building, 425 Jefferson Avenue, Toledo, Ohio 43604.

_____

PATRICK ANDREW DEVINE
Assistant Attorney General

APPENDIX

TABLE OF CONTENTS

Page

A. Opinion and Judgment of United States Court of Appeals for the Sixth Circuit (Case Nos. 85-3664 and 85-3807), entered January 8, 1987 ....A-1

B. Memorandum and Order of United States District Court for the Northern District of Ohio, Western Division (Case No. C 84-7395), entered July 19, 1985 ..... A-24

C. Findings of Fact and Conclusions of Law of United States District Court for the Northern District of Ohio, Western Division (Case No. C 84-7395), entered July 30, 1984 ..... A-38

D. Stipulation in the United States District Court for the Northern District of Ohio, Western Division (Case No. C 85-7542), filed September 6, 1985 ..... A-52

E. Notice of Appeal, filed March 20, 1987..... A-54

F. Text of Statutes Involved A-56

APPENDIX A

Nos. 85-3664 & 85-3807

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM P. ALLINDER and
CAROLINE I. ALLINDER d/b/a
SUNNYSIDE BEE FARM; ELMER
STEINER and MARILYN L. STEINER
Plaintiffs-Appellees,

v.

State of Ohio; Ohio Department
of Agriculture; Dale Locker,
Director of Ohio Department of
Agriculture; Eric Nelson,
Hardin County Bee Inspector,
Defendants-Appellants.

On Appeal from the
United States District Court
for the Northern District of Ohio.

Decided and Filed January 8, 1987

Before: ENGEL and MARTIN, Circuit Judges; and COHN*, District Judge.

COHN, District Judge, delivered the opinion of the court,

---

*The Honorable Avern Cohn, United States District Judge, Eastern District of Michigan, sitting by designation.

in which MARTIN, Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 16-22) delivered a separate dissenting opinion.

COHN, District Judge.

I. INTRODUCTION.

A. Nature of the Case.

This case involves a fourth amendment challenge to the scope of section 909.05 of the Ohio Revised Code (ORC) which empowers the Ohio Director of Agriculture or his authorized representative to conduct warrantless searches of apiaries and other premises, buildings or places where bees or bee paraphernalia are kept.[1] After notification of a planned warrantless inspection of their apiaries, the plaintiff-beekeepers commenced separate actions for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio. The district court granted the plaintiffs' motion for partial summary judgment in the *Allinder* action and permanently enjoined the Ohio Department of Agriculture from "conducting warrantless, nonconsensual inspections of apiaries pursuant to the Ohio Apiary Inspection Law,

---

[1]O.R.C. § 909.05 reads:

> To enforce sections 909.01 to 909.18, inclusive, of the Revised Code, the director of agriculture or his authorized representatives shall have access to and egress from any apiary or to any premises, buildings, or any other place, publice or private, in which he has reason to believe that bees, honey, wax, used hives, or used appliances are kept. No person shall resist or hinder the director or his authorized representative in the discharge of their duties under such sections. No occupied dwelling may be entered without a search warrant.

O.R.C. § 909.05 is part of Chapter 909: APIARIES of the Ohio Revised Code. Relevant sections will be described as necessary.

ORC § 909.05" on the grounds the law was unconstitutional "insofar as it purports to authorize non-consensual apiary inspections without a warrant or its equivalent." *Allinder v. Ohio,* 614 F. Supp. 282 (N.D. Ohio 1985). The *Steiner* plaintiffs and defendants stipulated that the order entants appeal from the injunctive orders in both cases. This in the *Allinder* action would apply in the *Steiner* action, court consolidated the two actions on appeal. For the the two actions would be consolidated for purreasons poses of appeal and trial on the remaining issues. Defendwhich follow, we affirm the district court in substantial part.

B. The Regulatory Scheme

Pursuant to Chapter 909 of the ORC, Ohio maintains an apiary[2] inspection program.[3] The program is designed to detect bee diseases in their early stages and to prevent their spread. ORC § 909.03 declares infected hives a public nuisance. Under ORC § 909.03, the director of agriculture has rulemaking and enforcement powers "as in his judgment are necessary to control, eradicate, or prevent the introduction, spread, or dissemination of any bee diseases." Of particular concern in the production of honey and pollination of crops is the spread of American Foulbrood disease (AFB) which infects the preadult state of the bee.[4] Although the disease is not harmful to humans, it can destroy entire colonies of bees. Under

---

[2]O.R.C. § 909.01(D) defines an apiary as "any place where one or more colonies or nuclei of bees are kept."

[3]A number of states have such programs. For a listing of federal and state bee disease laws, see *Honey Bee Pests, Preditors, And Diseases* Appendix 3 (R. Morse ed., Cornell University Press, 1978). The warrantless search privilege at issue here appears to be an exception.

[4]*See Identification and Control of Honey Bee Diseases,* Farmer's Bulletin No. 7255, Research Service, U.S. Department of Agriculture.

ORC § 909.02, a beekeeper must register his apiaries with the director of agriculture along with directions as to their location. Not all beekeepers are registered, primarily because of their ignorance of the statutory requirements.

The program is enforced by the state apiarist, four deputy apiarists, and part-time county inspectors who are appointed and funded by the individual counties and over whom the state retains little control.[5] Because of the technical knowledge needed to make inspections, inspectors are often competitors of those whom they inspect and are often charged with the responsibility of inspecting their own apiaries. Under ORC § 909.05, an inspector is expressly authorized to examine apiaries without prior notice, without a warrant and outside the presence of the owners.

There are no published rules and regulations. The inspectors are provided a training manual which appears to outline the goals and guidelines of the program. Final decisions as to what to inspect, how to inspect and when to inspect rests with the individual inspectors.

Inspection involves manipulation of the hive[6] and not merely visual inspection of the exterior of an apiary. The inspector approaches the hive and removes the lid with a crowbar-like hive tool. The front entrance of the hive is then smoked with another appliance to subdue the bees. Smoking continues as needed throughout the inspection process. The inner cover, honey layers, queen excluder, and other layers are manipulated and removed to arrive

---

[5]Two counties in Ohio did not appoint inspectors for 1983.

[6]O.R.C. § 909.01(F) defines a hive as "any modern frame hive, box hive, box...or any other receptacle, natural or artificial, or any part thereof, which may be used as a domicile for bees."

at the bottom layers where the brood[7] chambers are located. All the layers in the hive are stuck together with propolis, a sticky substance which the bees process from tree residues, and which generally has to be pried from the hive. Some of the brood frames are then removed and examined for signs of disease. If the inspector diagnoses AFB, surrounding colonies or sometimes the entire apiary is quarantined under ORC § 909.04. A sample is taken from the colony and sent to the Ohio Department of Agriculture laboratory for testing. If the presence of AFB is confirmed, the bees and hive equipment are ordered destroyed by burning. Under ORC §909.16, the beekeeper has five days within which to appeal the decision to burn the bees and equipment to the Director of Agriculture whose determination is final.

C. The Parties.

The Allinders and the Steiners are commercial beekeepers in the business of raising bees for honey production and renting bees to farmers for crop pollination. The Allinders' 600 hives and the Steiners' approximately 850 hives are located in seven different counties in Ohio. They registered their apiaries with the added notation "No inspection permitted without a warrant."

II. THE ELEVENTH AMENDMENT.

A. The State Defendants.

Defendants first argue that the district court did not have jurisdiction under the eleventh amendment bar to an action against the State. The argument has merit as to

---

[7]Brood refers to the preadult stage of the bee. The honey is kept in layers separate from where the queen lays her eggs or the brood. Most hives contain a "queen excluder" which keeps the queen from traveling to the honey layers and depositing her eggs there.

defendants State of Ohio and Ohio Department of Agriculture. The Supreme Court has consistently interpreted the eleventh amendment to preclude a citizen from bringing suit against his own state in a federal court. *Edelman v. Jordan,* 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *Employees v. Dep't of Public Health and Welfare of Missouri,* 411 U.S. 279, 93 S. Ct. 1614, 36 L.Ed.2d 251 (1973). Contrary to plaintiffs' contention that defendants have waived immunity by proceeding in these actions, a waiver of eleventh amendment immunity will be found only where indicated "'by the most express language or by such overwhelming implications from that text as [will] leave no room for any other reasonable construction.'" *Edelman,* 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171, 29 S. Ct. 458, 53 L.Ed.2d 742 (1909)); *Ohio v. Madeline Marie Nursing Homes #1 and #2,* 694 F.2d 449 (6th Cir. 1982). The defense may be raised for the first time on appeal, *Edelman,* 415 U.S. at 678, and a state's appearance and offer of defenses on the merits is no bar; the defense is jurisdictional and may be raised at any stage of the proceedings. *Florida Dep't of State v. Treasury Salvors, Inc.,* 458 U.S. 670, 683 n. 18, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (Opinion of Stevens, J.). Defendants asserted the eleventh amendment as an affirmative defense in their answers to the complaints in both actions and have never indicated an intention to waive the defense. *See Madeline Marie Nursing Homes #1 and #2,* 694 F.2d 449. The State of Ohio and the Ohio Department of Agriculture must be dismissed as defendants for lack of jurisdiction.

B. The Individual Defendants.

The eleventh amendment defense of defendants Eric Nelson, a bee inspector in the *Steiner* action, and Dale Locker, the director of the Ohio Department of Agriculture in both actions, implicates an exception to eleventh

amendment immunity first recognized in *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). In *Young,* the Supreme Court held that state immunity did not shield a state official attempting to enforce an unconstitutional act. Under *Young,* a state cannot transfer its immunity to an official who must accede to his "responsibility to the supreme authority of the United States." 209 U.S. at 160. Accordingly, Nelson and Locker are proper defendants.

III. THE FOURTH AMENDMENT.

A. The Existence of a Search.

1. Open Fields.

Before invoking the fourth amendment, we must first determine if there has been a search. *Dow Chemical Co. v. United States,* 749 F.2d 307, 311 (6th Cir. 1984), *aff'd,* 106 S. Ct. 1819, 90 L.Ed.2d 226 (1986). Defendants argue that no search occurred, relying on the "open fields" doctrine first enunciated in *Hester v. United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L.Ed. 898 (1924), and recently reaffirmed in *Oliver v. United States,* 466 U.S. 170, 104 S. Ct. 1735, 80 L.Ed.2d 214 (1984). In both *Hester and Oliver,* the Supreme Court held that a visual observation of an open field did not violate the fourth amendment.

Defendants' reliance on these cases is misplaced. *Oliver* did not overrule the holding in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the fourth amendment protects persons and not places.[8] See 466 U.S. at 176 n.6. *Oliver* focused on factors

---

[8]In *Katz,* the Supreme Court defined the two elements necessary to constitute a search under fourth amendment standards: (i) an actual or subjective expectation of privacy (ii) that society would deem reasonable. 389 U.S. at 361 (Harlan, J., concurring). The notation placed on plaintiff's registration form certainly created in them the necessary subjective expectation.

such as the "intention of the Framers of the Fourth Amendment", the uses to which a location is put and the societal understanding as to areas deserving protection from government invasion in concluding that society does not recognize an expectation of privacy in open fields as reasonable. *Id.* at 178-79. In decisions following *Katz,* the Supreme Court has consistently adhered to the open fields doctrine while at the same time recognizing that it is limited in scope to "sights seen in 'the open fields.'" *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.,* 416 U.S. 861, 865 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). In *Air Pollution Variance Bd.,* the Supreme Court held that a field inspector did not violate the fourth amendment when he stood on the property of defendant to observe plumes of smoke and visually rate them as to air pollution standards. The Court carefully noted that the inspector did not enter the physical plant or inspect the files, papers or equipment of defendant. *Id.* at 864-65.

Similarly, in *Maine v. Thornton,* a case consolidated with *Oliver,* the officers making a visual inspection of fields spotted marijuana growing, but they obtained a search warrant before they seized the marijuana. 466 U.S. at 174. In *Maine,* the Supreme Court also distinguished the fourth amendment protection afforded to "effects" by limiting the term "effect" to personal rather than real property." *Id.* at 177 n. 7.

More recently, in *Dow Chemical Co. v. United States,* the Supreme Court applied the open fields doctrine to uphold the aerial observation and photography of an industrial plant complex. The Supreme Court did acknowledge that defendant had a legitimate expectation of privacy from unreasonable government entries into its covered buildings and private commercial property while emphasizing that the observation took place "*without* physical entry", and that any such entry would raise "sig-

nificantly different questions." 106 S.Ct. at 1825-26 (emphasis in original).

2. Limitations on Open Fields.

There is no case, however, where the open fields doctrine has been applied to allow a search of personal effects or of a commercial structure in a field. Defendants attempt to extend the holding in *Oliver* beyond the open fields exception it addressed, and into the realm of structures as presented in this case, must fail. To so extend the open fields exception, we would have to ignore a long line of Supreme court cases which have extended fourth amendment protection to areas other than the home and its curtilage. *Cf. Donovan v. Dewey,* 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d (1981) (stone quarry); *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)(luggage); *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1979)(store); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (employee working area of business premises); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (office); *United States v. Chadwick,* 433 U.S. 1, 538, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (footlocker); *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (locked commercial warehouse).[9]

---

[9]The case closest to the circumstances involved here is *Cady v. Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973). *Cady* involved an automobile which had been parked in a field. After viewing a bloody interior of the car through a window, a police officer obtained a search warrant. The search turned up a bloody sock and floor mat. The defendant argued that the search was illegal because the two items were not particularly described in the warrant. The Supreme Court upheld the search on the basis of the warrant and added, "We therefore need not reach the question of whether...a

B. Apiaries.

Inspections authorized by ORC § 905.05, and the inspections to which plaintiffs object here, do not involve a mere visual inspection of apiaries in an open field. Rather, the statute allows a warrantless inspection of "any premises, buildings, or any other place, public or private, in which [the Director of Agriculture or his authorized representatives have] reason to believe that bees, honey, wax, used hives, or used appliances are kept," except "occupied dwelling[s]." *Id.* Thus, for example, it allows for an entry into any commercial structure where bee equipment is stored. But as the Supreme Court has explained: while the government may observe, without a warrant, whatever is observable by the public, areas where only employees are permitted are not "thrown open...to the warrantless scrutiny of Government agents." *Barlow's, Inc.*, 436 U.S. at 315. "(R)easonableness is still the ultimate standard." *Id.* (quoting *Camara v. Municipal Court,* 387 U.S. 523, 539, 87 S.Ct. 1727, 18 L.Ed.2d 9300 (1967)).

Nor can the warrantless physical intrusion, manipulation and dismantling of the hives themselves be sanctioned by the visual inspection allowable under the open fields doctrine. Apiaries are commercial property. They are also personal property since they are movable and at times are moved for rental to farmers in crop pollination. As such they fall within the definition of effects in *Oliver,*

---

search of the back seat of this car, located as it was in an open field, required a search warrant at all." *Id.* at 449-50. *Cady* is also distinguishable beacuse the automobile was found abandoned in a field, and the Supreme Court decisions have consistently provided a lesser degree of protection to automobiles because of their mobility.

466 U.S. at 177 n.7,[10] and are therefore expressly afforded protection by the fourth amendment.

While the hives are subject to visual observation of their exteriors by a passerby, there is no claim that the hives give the appearance of abandoned property. Inspections can only be performed by a trained apiarist. The hives have bees entering and exiting at all times. As previously described, a smoker must be used to subdue the bees to enable an inspector to approach a hive, and a special hive tool must be used to pry apart the layers of the hive. With the exception of the small opening for bees, the hive is virtually sealed shut with bee propolis. The interior of the hives are simply not accessible to the public's view. The apiaries are "effects" and as such are part of plaintiffs' commercial personal property. We conclude that the physical intrusion, manipulation and dismantling of the hives by a state inspector constitutes a search under the fourth amendment.

C. The Administrative Search Exception to the Warrant Requirement.

For nearly two decades, the Supreme Court has followed the general rule that a warrant is required before conducting an administrative search of commercial property or commercial products. *See v. City of Seattle,* 387 U.S. at 544-45. In *See,* the Supreme Court concluded that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." 387 U.S. at 544.

---

[10]"The Framers would have understood the term 'effects' to be limited to personal, rather than real, property."

Later decisions have limited this rule so that the fourth amendment does not prohibit all such searches, but only those that are unreasonable. *Donovan,* 452 U.S. at 599. In *Donovan,* the Supreme Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the fourth amendment. This Circuit has characterized these exceptions under the rationale of "the notion of implied consent." *Dow Chemical Co.,* 749 F.2d at 311 n.1; *see also, Barlow's, Inc.,* 436 U.S. at 313. However, since this form of search is an exception to the warrant requirement, the burden of proof rests with the party asserting the exception. *See Barlow's, Inc.,* 436 U.S. at 324.

1. Pervasively and Closely Regulated Industries.

An exception to the warrant requirement exists for "closely regulated industries long subject to inspection" and for "pervasively regulated" businesses, *Barlow's, Inc.,* 436 U.S. at 313, for which, because of the nature of the regulation, no reasonable expectation of privacy exist. *Cf. Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (pawn shop).

Defendants argue that the state regulatory scheme involved here amounts to close and pervasive regulation. But as the district court noted:

> The state apiarist testified that less than 100% of the beekeepers in Ohio are registered and that only about 85% of those registered are inspected every year. (Inj. Tr. at 33). He testified further that the typical reason for failure to register colonies is beekeepers who are unaware of the registration

and inspection requirements.[11]

Moreover, the statute does not pervasively regulate the beekeeping industry. Defendants concede that the limited function of the statutory scheme is to control and eradicate bee diseases. We conclude that defendants have failed to establish that a beekeeper's expectation of privacy in an apiary is unreasonable where the record fails to show either that the beekeeping industry has a long history of close regulation or that it is currently subject to pervasive and comprehensive regulation in Ohio.

2. A Predictable and Guided Regulatory Presence.

In *Donovan,* 452 U.S. at 604, the Supreme Court acknowledged another exception to the warrant requirement: A warrantless search is permissible if a statute "establishe [s] a predictable and guided federal regulatory presence." See also *Dow Chemical,* 749 F.2d at 311 n.1: "Inherent in this exception is a test that balances the strength of the federal regulatory interest, on the one hand, with the reasonable expectation of privacy of the commercial entity on the other."

In *Donovan* the Supreme Court explained the criteria necessary to establish this exception as follows:

> (A) warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject

[11] *Allinder v. Ohio,* 614 F. Supp. 282, 285 (N.D. Ohio 1985).

> to periodic inspections undertaken for specific purposes.

452 U.S. at 600.

Defendants argue that inspections of apiaries must be warrantless because of the need to retain the element of surprise so that a beekeeper cannot hide a diseased hive from the inspector's view. Apiaries, defendants say, are so spread out and are so mobile, this is easy to hide from inspectors. They further argue that since the inspection season in limited, because inspections can only be conducted on a warm, dry day, and since most of the inspectors work part-time only, time is of the essence, and it would be an administrative burden to require a warrant.

The district court rejected these arguments in light of the testimony of the state apiarist that most beekeepers were hobbyists who welcomed inspections as an aid, and in light of testimony that plaintiffs were notified of an inspection three days in advance. The district court noted that the high incidence of voluntary compliance refuted the argument as to administrative burden because most inspections would not require a warrant.

This same line of argument was rejected in *Barlow's, Inc.*, 436 U.S. 307 (an electrical and plumbing installation business). In that case the Supreme Court noted that the government could obtain warrants *ex parte* and issue them without notice, thus retaining the element of surprise. The Supreme Court also rejected the administrative burden argument by reasoning that the government had failed to show that the required time lapse for obtaining the warrant seriously impeded the statute's effectiveness. *Id.* at 316-19. In reaching this conclusion the Supreme Court noted that lower standard of proof for justifying issuance of an administrative search warrant. *Id.* at 320.

The district court also concluded that the program was subject to the warrant requirement because the statute provided too much discretion, i.e., it did not provide certainty, regularity and fairness. There is no requirement that inspections are to occur on any predetermined regular basis; there is only a "goal" to provide yearly inspections. Defendants concede that they are hampered in reaching this goal because of a lack of funds, that available funds were subject to the discretion of the various counties who provided supplementary inspectors and that the goal had not been achieved.

Like the statute in *Barlow's, Inc.*, 436 U.S. at 323, the program scheme simply provides too much discretion in the individual inspector. Like the statute in *Barlow's, Inc.*, the program "fails to tailor the scope and frequency of such administrative inspections to the particular" purpose. *Donovan,* 452 U.S. at 601. The program is ripe for potential abuse, especially because inspectors are often competitors of the apiaries inspected. Because an apiarist never knows when an inspection is due, and need not be present at an inspection, such broad discretion in inspectors can lead to problems as to hives which cannot be moved or disturbed, e.g., because of requeening. Exceptions to the warrant requirement are limited to those situations where the regulation scheme provides all the protection that a warrant would otherwise provide. Donovan, 452 U.S. at 598-99, 605. This condition is simply not met by the program at issue here.

In *Barlow's, Inc.*, the Supreme Court concluded:

> A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan

containing specific neutral criteria.

436 U.S. at 323.

We agree. Our decision today does not invalidate the entire regulatory scheme. Rather, we hold only that ORC § 909.05 authorizing nonconsensual warrantless inspections is unconstitutional.

The decision of the district court is AFFIRMED in part and REVERSED in part, and this case is REMANDED to the district court for further proceedings.[12]

---

[12]In response to the dissent's position that what we decide today is "potential and (hypothetical)", we are satisfied that the dispute between the Allinders, the Steiners and the Ohio Department of Agriculture is not an "imaginary" one. *Yazoo and Mississippi Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 220, 33 S.Ct. 40, 57 L.Ed. 193 (1912) (the Court must decide the case at hand, and how the state court may apply the statute at issue to other cases, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now). Plaintiffs are clearly threatened with warrantless searches of their apiaries under the authority of O.R.C. § 909.05, and O.R.C, §§ 909.18 and 909.99 subject them to a penalty should they resist. They have shown they are injured by the operation of O.R.C. § 909.05, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 228. 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, Jr., concurring) (The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation), and we have not confronted "a hypothetical case thus imagined." *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed 2d 524 (1960)(the delicate power of pronouncing a statute unconstitutional is not to be exercised with reference to hypothetical cases thus imagined). Also, it should be noted that our decision is consistent with the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Lutz*, No. J-57-86 (Pa. Sup. Ct. Oct. 17, 1986), holding a Pennsylvania statute that authorizes warrantless searches of premises holding nonhazardous wastes unconstitutional on grounds that there was a lack of reasonable legislative or administrative standards governing such searches.

ENGEL, Circuit Judge, dissenting. I respectfully dissent. I would hold that the right to be free from unreasonable searches and seizures under the Fourth Amendment is not infringed by the inspection of beehives located in open fields by state apiarists in accordance with the challenged state statute. I would so hold because in my opinion there is no reasonable expectation of privacy either on an objective basis, *see Katz,* 389 U.S. 347 (1967), or on a subjective basis, *see Smith v. Maryland,* 442 U.S. 735, 740-41 (1979), in the contents of the hives. They were placed in the open fields with full knowledge that they were subject to inspection.

The majority opinion addresses potential hypothetical concerns which are not present here. It assumes bad faith and motives on the part of the inspector which are not present in the record. To me it is enough to hold that the Ohio statute is valid as applied to the present circumstances. *Yazoo & M.V.R.R. v. Jackson Vinegar Co.,* 226 U.S. 217, 219-20 (1912).

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situa-

> tions in which its application might be unconstitutional. . . . [A]pplication of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

United States v. Raines, 362 U.S. 17, 21-22 (1960) (citations omitted, but include *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347-48 (Brandeis, J., concurring)).

The record here shows that deputy inspector Lamp on behalf of the state informed the Allinders that he would appear "at their residence" without a warrant to search all of their apiaries containing beehives. Steiner also received prior notice. Allinder refused to let Lamp enter any part of his land and did not prohibit entry only to the curtilage. There is nothing in the record to suggest that the hives in question were within the curtilage or within any other out-building to which any independent expectation of privacy protectable under the Fourth Amendment might have attached.

No one disputes that American foulbrood is a serious disease for bees. That the disease poses no threat to humans may lessen but does not remove the legitimate state concern in the regulation of this industry. As I understand it, the time period for the disease to spread is relatively long, as spores can sit within the hive for 10, 12 or 14 days before the disease attacks the bees. The disease actually attacks the bee larvae and it is spread by a process called "robbing."

The act of inspection takes about five minutes per colony. During the search, the apiarist is smoking the front entrance periodically to subdue the bees, but the smoking does not occur during the whole search. It

seems unquestioned that to determine if a particular hive has been infected, an apiarist must take off the cover, the queen excluder, the inner cover, and the frames since the disease does not manifest itself to someone viewing the outside of the hive. Physical entry into the hive therefore is not an arbitrary act and there seems no other less intrusive way to carry out the legitimate purpose of the act. The plaintiffs do not claim an absolute right to be free from having their hives inspected by the state apiarists. That being true, they do not claim that they are free from having the hives disturbed to the extent necessary to carry out the statutory inspection.

The statutory scheme is quite pervasive. Every Ohio beekeeper under law must register the location of all of his bee colonies within the state. There is no penalty for knowingly maintaining diseased hives, but there is a penalty for failing to register. As the majority opinion notes, less than 100 percent of the beekeepers comply, apparently because many are amateurs ignorant of the statutory scheme. And likewise, not all hives registered are in fact inspected. Neither of these factors I believe affects the validity of the regulation or of inspections carried out under it, nor do they affect the question of whether the inspection process intrudes upon any areas or protected zones of privacy under the Fourth Amendment. The Department's county inspectors try to find unregistered colonies and to make personal visits. They also send letters in an effort to increase compliance. The statute does not specify any regular period for inspection, but according to the record the Department tries to inspect each hive once a year. Allinder's hives were inspected every year from 1973 until the litigation was commenced.

If foulbrood is found, a sample is sent to a state laboratory. While the sample is at the lab, a quarantine is made

prohibiting the beekeeper from removing the bees from the apiary. The colonies, however, are still active during the quarantine period. If the inspection itself reveals the existence of foulbrood, the plaintiffs do not and I think probably cannot claim the right to retain the bees or otherwise to contest the right of the state to have those bees destroyed. If the bees are diseased, undoubtedly a major economic loss could be involved, but the statute provides notice and opportunity to be heard before the bees can actually be destroyed. There is a danger of loss from the inspection, it is true. If the hive is improperly reassembled, error in this regard may cause the loss of a queen or distortion of the production of honey. In fact, if the queen is lost, so also is the hive's honey crop for the year.

Given these most apparent facts from the record, it seems to me that in determining whether any expectation of privacy should attach to the interior of a beehive in an open field depends upon whether that expectation is one which society is prepared to respect as worthy of privacy, and I simply cannot see that concept applying here. "[R]easonableness is still the ultimate standard." *Marshall v. Barlows, Inc.* 436 U.S. 307, 3l5 (l978) (quoting *Camara v. Municipal Court* 387 U.S. 523, 529 (l967)). It does not seem to me that anyone who maintains a beehive in Ohio has any reasonable expectation that the contents of that beehive shall not be exposed to visual inspection by state inspectors as part of the necessary performance of their duties under an otherwise valid statute enacted pursuant to the state's police powers and in furtherance of the state's right to protect the public from harm.

It is true that the inspection statute at section 909.05 allows warrantless searches of hives and equipment so long as there is no intrusion into a dwelling. No expecta-

tion of privacy under the Fourth Amendment extends to the conduct of the inspectors insofar as they enter upon the open fields, however, and visual observation of the hives in the open fields does not violate the Fourth Amendment. *Oliver v. United States,* 466 U.S. 170 (1984) (reaffirming the original "open fields" doctrine first enunciated in *Hester v. United States,* 265 U.S. 57 (1924)). The inspector's conduct which must be scrutinized, therefore, is the act of locating the hive in the open field and, having located it, in opening the hive and performing the necessary test to discover whether the larvae are infected.

I believe that the majority has been led into error by considerations which might arguably have due process implications but which are not involved in the values protected by the Fourth Amendment. It seems to me that the majority's reliance upon the law concerning structures such as outbuildings is simply inapplicable. The beehives are not places of human habitation or places where human beings could even expect to work or occupy and thus carry on activity in which they might have some expectation of privacy. Likewise, the beehives do not fit my understanding and concept of containers generally. Beehives are no doubt personal property but the law is clear that the amendment protects people and not property. *Katz,* 389 U.S. at 347. Not all effects are protected by the Fourth Amendment against warrantless searches and not all real property is unprotected. *Carroll v. United States,* 267 U.S. 132, 151 (1925) (upholding warrantless search of automobile while suggesting that a warrant would be required to search a dwelling). As the majority notes, *Oliver, supra,* protects the concepts of *Katz v. United States,* 389 U.S. 347 (1967). Thus, the real question is whether a beehive is the kind of effect to which there attaches a reasonable expectation of privacy.

I would agree with the majority that it makes no difference whether we consider the hives as "abandoned". Plainly they were not here as evidenced by the notices placed upon the registrations. Nor is the expectation of privacy lost because the use of the hives is commercial and not personal. I also readily recognize that in *Dow Chemical Co. v. United States,* 106 S.Ct. 1819 (1986), *aff'g* 749 F.2d 307 (6th Cir. 1984), the Supreme Court applied the open field doctrine to uphold aerial observation and photography of an industrial plant complex while at the same time recognizing that the defendant Dow there had a legitimate expectation of privacy from unreasonable government entry into its covered buildings and private commercial property. It also noted that the aerial observation made in *Dow* took place "without physical entry" and that the Supreme Court observed that any such entry would raise "significantly different questions." 106 S.Ct. at 1825-26. I do not read anything, however, in *Dow,* or in any of the exceptions or the qualifying language of the opinions the majority cites, to indicate the recognition of a substantial privacy interest in personal property such as a beehive which contains only the things expected therein—bees, larvae, and all of the customary contents making up an operating colony for the production of honey. Certainly the bees have no privacy interest protectable under the Fourth Amendment. And unlike a container which may mask its contents and which may provide an aura of privacy for uncertain contents, here one finds exactly what one would expect. I therefore do not equate the hive to some type of luggage or other container which might potentially contain a wide variety of objects, some of which might be of a personal nature.

There may arguably be some authority to support the fact that because Allinder and Steiner had previously allowed inspection of their beehives, they had demon-

strated no personal or subjective claim of privacy with respect to them, and therefore the reassembly of the hives would not revive or restore any previously recognized and lawfully invaded privacy rights. *See Illinois v. Andreas,* 463 U.S. 765 (l983), holding that a package once lawfully inspected without a warrant did not regain its privacy aspects when it was resealed and delivered to its addressee but after agents had discovered that it contained contraband. *See also Alinovi v. Worcester School Committee,* 777 F.2d 776 (lst Ciner previously opened under lawful authority," 465 U.S. at 773, I do not think it is necessary to rely upon this proof to justify the search.

To me, the cases cited by the majority are inapposite. They apply to searches of structures where people have a reasonable expectation of privacy in carrying on commercial activities. Some involve invasion of containers in which similar expectations may exist because the owner might conceivably desire to keep from public view the undisclosed contents thereof. No surprises or commercial secrets are involved here. The hives contain the honey bees and the combs and the larvae. Some may be contaminated by foulbrood; nothing more, nothing less. I would vacate so much of the district court's decision as is inconsistent with the foregoing and remand for further proceedings.

APPENDIX B

No. C 84-7395

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM P. ALLINDER, et al.,
Plaintiffs,

v.

STATE OF OHIO, et al.,
Defendants.

Filed July 19, 1985.

MEMORANDUM AND ORDER OF THE COURT BY JUDGE WALINSKI

This matter is before the Court on a motion for partial summary judgment filed by plaintiffs, William P. Allinder and Caroline I. Allinder. Defendants have filed a memorandum in opposition to the motion for summary judgment. Also before the Court is plaintiffs' reply to defendants' memorandum in opposition. Plaintiffs' motion for partial summary judgment seeks a declaration of this Court that the Ohio Department of Agriculture's apiary inspection program is an unconstitutional exercise of state power in that plaintiffs' apiaries are being inspected by the state without a search warrant, without their prior knowledge and outside their presence; and thus constitute an unreasonable and unlawful search of their property. Plaintiffs further seek a declaration that Ohio Rev. Code § 909.05 is unconstitutional to the extent that it provides legislative authority to the Ohio Department of Agriculture

to conduct administrative inspections of plaintiffs' apiaries without securing a search warrant.

On May 9, and 10, 1984, the parties presented testimony and documentary evidence on this issue at a hearing before the Court on plaintiffs' motion for preliminary injunction. In Findings of Fact and Conclusions of Law ("Findings"), filed on July 30, 1984, this Court concluded that the plaintiffs failed to establish irreparable harm and, therefore, denied the motion for preliminary injunction. The July 30th opinion, however, considered at length the warrant requirements relating to administrative searches and found that plaintiff established a substantial likelihood of success on the merits of their claim. The opinion further questioned the existence of material issues of fact concerning the constitutionality of the warrantless search provision of the Ohio Apiary Inspection Law. O.R.C. § 909.05. Plaintiffs then filed the motion *sub judice*.

Rule 56, Fed.R.Civ.P. directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . .

In ruling on a motion for summary judgment, the Court's function is to determine if any genuine issue exists, not to resolve any factual issues, and to deny summary judgment if such an issue exists. *United States v. Diebold, Inc.*, 369 U.S. 654, (1962); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the Court must

construe the evidence in its most favorable light for the party opposing the motion and against the movant." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). To summarize, if the movant demonstrates that he is entitled to a judgment as a matter of law, then the Court must next weigh the evidence in a light most favorable for the party opposing the motion; if reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Rule 56(e) places a responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provisions states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

Plaintiffs' complaint argues that the Ohio Apiary Inspection Law, O.R.C. § 909.01 *et seq.*, violates their constitutional rights to be free from (1) unlawful search and seizure and (2) taking property without due process of law. The singular issue upon which plaintiffs seek relief in their motion for partial summary judgment is whether the warrantless search of their apiaries, pursuant

to the Ohio Apiary Inspection Law, violates the Fourth Amendment's prohibition against unreasonable searches. The Court's present consideration is therefore limited to that issue.

The United States Supreme Court recently reaffirmed the longstanding view that administrative, nonconsensual entry and search of property is governed by the warrant requirement of the Fourth and Fourteenth amendments. *Michigan v. Clifford,* 104 S.Ct. 641, 646 (1984). *See also Marshall v. Barlow's Inc.,* 436 U.S. 307, 311-13. (1978); *Camara v. Municipal Court,* 387 U.S. 523, 528-33. (1967). The Fourth Amendment's prohibitions against unreasonable searches was extended to administrative inspections of private commercial property nearly a decade and a half ago. *Camara,* 387 U.S. at 523; *See v. City of Seattle,* 387 U.S. 541 (1967). The reason for this extension was found in the basic purpose of the amendment, which is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara,* 387 U.S. at 528.

The Fourth Amendment warrant requirement, however, is not without exception. *Donovan v. Dewey,* 452 U.S. 594 (1982); *United States v. Biswell,* 406 U.S. 311. (1972): *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The United States Supreme Court recently stated:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. *See, e.g., United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The greater latitude to conduct

> warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that his privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *United States v. Biswell, supra,* at 316.

Donovan, 452 U.S. at 598-99. (footnote omitted). Courts have been unable to articulate a "ready test" for determining reasonableness other than by balancing the need for the warrantless search against the businessman's privacy interest. *Camara,* 387 U.S. at 536-37. The determinative factors to be considered are, whether the state has shown a substantial need for warrantless searches, whether the industry affected is so closely regulated as to provide notice of the prospect of governmental intrusion and whether the statutory scheme enacted "provides an adequate substitute for a warrant in terms of the certainty and regularity of its application." *Donovan,* 452 U.S. at 603.

First, the Court has some doubt as to the state's need for a warrantless search. The defendants argue that warrantless searches are essential to the apiary inspection system to preserve the advantage of surprise. They assert that "[i]t would be a very simple matter for a beekeeper to remove a diseased hive from the inspector's eyes only to return it to its original position following the inspection." This argument is unpersuasive in light of the testimony at the injunction hearing of the state apiarist, who stated that a vast majority of the beekeepers in Ohio are hobbyists. These hobbyists are unfamiliar with the symptoms of the infectious bee diseases, and consider the state inspection for disease to be a worthwhile ser-

vice. Moreover, testimony indicated that notice to beekeepers is left to the discretion of the individual inspector. In the instant case, the deputy state inspector called the plaintiffs giving them three days notice of an inspection. The Court, therefore, questions the viability of this "surprise" argument and, in turn, questions the state's showing of need for a warrantless search.

Defendants further submit that obtaining a search warrant for individual apiary inspections would effectively eliminate the apiary inspection program. The state expresses concern as to the administrative burden, as well as the effect the time lapse would have on the program with its unique seasonal nature. This Court is unconvinced, however, that requiring warrants to inspect would impose serious burdens on the inspection system or the courts, would prevent inspections necessary to enforce the statute, or would make the program less effective. As discussed above, it is clear that a great majority of the apiarists can be expected to consent to inspection without a warrant. In those few cases where owners do insist on a warrant, the delay and increased administrative burden will not be so serious as to endanger the inspection program.

Second, the Court must consider whether the beekeeping industry has been "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 76-77. (1970). In *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 313. (1978), the Supreme Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into such a business could have a justifiable expectation of privacy. *Balelo v. Baldrige,* 724 F.2d 753, 764 (9th Cir. 1984). Liquor, firearms and mines are industries found to be "closely regulated." *Colonnade Catering Corp. v. United States,* 397 U.S. 72

(1970); *United States v. Biswell,* 406 U.S. 311 (1972); *Donovan v. Dewey,* 452 U.S. 596 (1982).

At the injunction hearing and in post-hearing briefs, the defendants argued that "the beekeeping industry in Ohio has been and continues to be closely regulated by the Ohio Department of Agriculture," and that "the individual beekeepers are aware of the requirements for periodic inspection." (D. Post-hearing Memo. in Opp. to Prel. Inj., at 13). Testimony presented at the evidentiary hearing, however, did not support these assertions. The state apiarist testified that less than 100% of the beekeepers in Ohio are registered and that only about 85% of those registered are inspected every year. (Inj.Tr. at 33). He testified further that the typical reason for failure to register colonies is beekeepers who are unaware of the registration and inspection requirements. Although the State of Ohio has been registering and inspecting bee colonies since the 1930's, the state's evidence fails to prove that such regulation had the pervasiveness and regularity necessary to affect the individual proprietor's legitimate expectation of privacy. Unlike the federal government's control over the alcohol, firearms, and mining industries, the beekeeping industry is not "pervasively regulated" by the Department of Agriculture under the Ohio Apiary Inspection Law. *See Dow Chemical Co. v. U.S.,* 536 F.Supp. 1355 (E.D. Mich. 1982).

Third, the Court must examine the statutory scheme to determine whether it provides "an adequate substitute for a warrant in terms of certainty and regularity of its application." *Donovan,* 452 U.S. at 603. The record indicates that unlike the Coal Mine Safety and Health Act examined in Donovan and found to provide a predictable, defined regulatory presence, the Ohio Apiary Inspection Law leaves the frequency of inspections to the unchecked discretion of the local inspectors. Upon

review of the evidence presented at the preliminary injunction hearing, this court concluded, in its Findings of July 30, 1984, that the apiary statute gives the field inspector unbridled discretion as to when to search and whom to search. (Findings, at 10). The defendants contend that this preliminary conclusion was erroneous.

Defendants argue that apiary inspections are unique in that they are seasonal and can only occur during favorable (warm, dry) weather conditions. (D.Mem. in Opp. S.J. at 10). Moreover, defendants contend that apiary inspectors are not exercising "unbridled" discretion since the department has an annual training program for all apiary inspectors at which each inspector receives the program guidelines and procedures set forth in a training manual. A new inspector will be subjected to extensive field training with a state inspector in his region before conducting inspections on his own. (Inj.Tr. at 142-43).

With reference to plaintiffs' evidence that the inspection program is conducted in an irregular and erratic fashion, defendant counters stating that plaintiffs' apiaries have not been inspected in recent years due to litigation by the Allinders in the state courts. The defendants urge that testimony at the hearing established that the goal of the apiary inspection program is to inspect each beekeeper once a year. The record indicates that approximately eighty-five percent of the registered beekeepers are inspected each year. (Inj.Tr. at 33). It is the defendants' contention that this is a statistically high rate of inspection considering the unique enforcement problems encountered in an apiary inspection program. Thus, the defendants argue that considering the unique nature of the apiary inspection program and utilizing the criteria set forth in both *Marshall* and *Donovan,* this Court should find the certainty, regularity and fairness necessary to render the warrantless searches of apiaries reasonable.

After thorough review of the Ohio Apiary Inspection Law, the transcript of the injunction hearing, the filed affidavits and the memoranda of the parties, the Court concludes that the statute, *sub judice,* does not provide an adequate substitute for a warrant in terms of certainty, regularity and fairness of its application. The authority to make warrantless searches devolves almost unbridled discretion upon the field inspectors as to when to search and whom to search. *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323 (l978). The existence of this discretion was conceded by defense witnesses several times during the injunction hearing. The state apiarist testified that the inspectors are part-time workers who plan their work as they see fit and that there is no minimum requirements for hours of inspection per week. (Inj.Tr. at 43-45). The inspectors decide when to inspect and whom to inspect. (Inj.Tr. at 44). The state apiarist further testified that the inspectors have to make subjective judgments regarding the presence of disease and that they have the authority to decide whether or not to send a smear sample for verification of the disease in the individual case. (Inj.Tr. at 80, 63). Even the manner of the inspection is left to the discretion of the individual inspector. (Inj.Tr. at 89).

The Ohio Apiary Inspection Law is, therefore, not sufficiently comprehensive and predictable that "the assurance of regularity provided by a warrant is rendered unnecessary." *Donovan v. Dewey,* 452 U.S. 599-602. The State of Ohio has failed to limit in any meaningful way the unbridled discretion granted the field inspector by the apiary inspection statute. "Where [the State] has authorized inspection but made no rules governing the procedures that inspector must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Corp. v. United States,* 397 U.S. 72, 77 (l970). Accordingly, I must conclude that a warrant is constitutionally required to assure an unconsenting apiary owner, who may have

little real expectation that his business will be subject to inspection, that the contemplated search is "authorized by statute, and... pursuant to an administrative plan containing specific neutral criteria." *Marshall v. Barlow's, Inc.*, 436 U.S. at 323.

In a typical commercial setting, the businessman's expectation of privacy is rarely at issue in an administrative inspection case. In the instant case, however, the plaintiffs' commercial setting consists of bee colonies placed on separate parcels of land, located in four Ohio counties. Given the atypical nature of this case, the Court must consider whether the plaintiffs have a reasonable expectation of privacy in light of the open fields doctrine of *Hester v. United States*, 265 U.S. 57 (1924) and its progeny.

Recently in *Oliver v. United States*, 104 S.Ct. 1735 (1984), the United States Supreme Court reaffirmed the vitality of the open fields doctrine. In that case, police discovered marijuana planted on a secluded section of the petitioner's farm, in a fenced area with no trespassing signs posted around the property. Granting a motion to suppress evidence, the district court concluded that this was not an "open" field because the petitioner "had done all that could be expected of him to assert his privacy in the area of the farm that was searched." *Id.* at 1738. The Court of Appeals for the Sixth Circuit reversed the district court. The Court of Appeals reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields. *Id.* at 1739. The United States Supreme Court affirmed this finding concluding that the petitioner's asserted expectation of privacy in the open field "is not an expectation that 'society recognizes as reasonable.'" *Id.* at 1741. The Supreme Court stated:

> [O]pen fields do not provide the setting for those

> intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas.

Id. at 1741. The *Oliver* case focuses on the legitimate expectation of privacy of the person whose open field was being searched. The Supreme Court examined the petitioner's legitimate privacy interest and concluded that none existed.

> It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marijuana upon secluded land and erected fences and no trespassing signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marijuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. *Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.* As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Id. at 1743 (emphasis added). Footnote 13 of the opinion appears to be particularly illustrative of the Supreme Court's rationale, where it states:"Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post no trespassing signs." *Id.* at 1743 n. 13.

It is clear to the Court that the open fields doctrine as enunciated in *Oliver* is not applicable to the instant case. Unlike the criminal activity discovered in *Oliver,* the commercial activity of the plaintiffs is both legal and valuable to society. Beekeeping, by its very nature, must be performed outside and in a natural setting. Legitimate commercial activities which cannot be completely confined or enclosed (i.e. lumber yards, sand mines and rock quarries) remain within the protection of the Fourth Amendment. The opinion in *Oliver* does not conclude that every activity carried on in an open field is outside constitutional protection. Rather, the Supreme Court stated that "the correct inquiry [to determine the *legitimacy* of the expectation of privacy] is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver,* 104 S.Ct. at 1743. *This Court concludes that beekeeping is among those commercial activities performed in an open field with a legitimate expectation of privacy which society recognizes as reasonable.*

Other considerations take the instant case outside the open fields exception as well. First, the statute authorizing the warrantless search of apiaries does not limit that search to bee colonies found in open fields. The statute in relevant part states the following:

> § 909.05 Power to enter upon premises.
> To enforce section 909.01 to 909.18, inclusive, of the Revised Code, the director of agriculture or

> his authorized representatives *shall have access to and egress from any apiary or to any premises, building, or any other place,* public or private, in which he has reason to believe that bees, honey, wax, used hives, or used appliances are kept. No person shall resist or hinder the director or his authorized representative in the discharge of their duties under such sections. No occupied dwelling may be entered without a search warrant.

Thus, the express language of the apiary law authorizes the search of any premises, building, or any other place which may store bees, honey, wax, used hives or used appliances. The warrantless search of an apiary or building located on the curtilage around a home, effected by means of a physical intrusion into the curtilage, clearly violates the Fourth Amendment absent exigent circumstances. *See Dow Chemical Co. v. United States, 749 F.2d 307 (6th Cir. 1984); Robertson v. United States,* 165 F.2d 752 (6th Cir. 1948). Second, unlike the EPA's photographic flyover considered by this Circuit in *Dow Chemical Co. v. United States,* 749 F.2d 307 (6th Cir. 1984), the governmental inspection in the instant suit is without question sufficiently intrusive to constitute a "search" triggering the warrant clause of the Fourth Amendment. State apiary inspectors cannot do "walk by" inspection of bee colonies to detect disease. The state approved inspection technique requires opening of the colony, manipulation of the frames, location of the queen and examination of the brood. Clearly, this type of intrusion goes far beyond the public observation non-search involved in the open fields exception to the Fourth Amendment.

For these reasons, the Court concludes that the open fields exception does not take this case out of the purview of the Fourth Amendment. The Court finds that there

is no genuine issue as to any material fact related to this claim. The Allinders have proved an actual expectation of privacy in their apiaries, and that expectation is one the society is prepared to recognize as reasonable. The Court further finds that warrantless, nonconsensual inspections of apiaries to be unreasonable under the Fourth Amendment.

I hold that the Ohio Apiary Inspection Law is unconstitutional insofar as it purports to authorize nonconsensual apiary inspections without a warrant or its equivalent.

For the foregoing reason, it is

ORDERED that the Allinders' motion for partial summary judgment is hereby granted.

FURTHER ORDERED that the Ohio Department of Agriculture is permanently enjoined and restrained from conducting warrantless, nonconsensual inspections of apiaries pursuant to the Ohio Apiary Inspection Law, O.R.C. § 909.05.

/s/ Nicholas J. Walinski
United States District Judge

Toledo, Ohio
July 19, 1985

APPENDIX C

No. C 84-7395

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM P. ALLINDER, et al.,
Plaintiff,

v.

STATE OF OHIO, et al.,

Defendant.

Findings of Fact and Conclusions of Law.

Entered July 30, 1984

Before: WALINSKI, J.

This matter is before the Court on plaintiffs' motion for a preliminary injunction and defendants' opposition thereto. This action is brought pursuant to 42 U.S.C. §1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§1331 and 1343 and the aforementioned statutory and constitutional provisions.

A hearing was held on May 9 and 10, 1984 on the motion for a preliminary injunction. The parties presented exhibits and testimony to the Court, and after carefully scrutinizing the evidence it is the opinion of this Court that the injunction should be denied.

FINDINGS OF FACT

Upon the record before it, the Court makes the following findings of fact.

1. Plaintiffs William and Caroline Allinder are citizens of the United States and are residents of the State of Ohio, residing in Gibsonburg, Ohio. Plaintiffs are engaged in the business of raising bees for the production of honey and for the pollination of farmers' crops. The Allinders' apiaries contain approximately 800 colonies of bees in Sandusky, Seneca, Putnam and Wood Counties in the State of Ohio.

2. Defendants are the State of Ohio, the Ohio Department of Agriculture and Dale Locker, in his official capacity as Director of the Ohio Department of Agriculture.

3. The defendants maintain an apiary inspection program pursuant to Ohio Revised Code Section 909.01 et. seq.

4. The defendants routinely conduct apiary inspections (1) without prior notice to the apiary owners, (2) without a search warrant and (3) outside the presence of the apiary owner.

5. Neither Ohio law nor policies promulgated by defendants mandate any particular inspection scheme. Decisions as to who is to be inspected, and when inspections are to take place, are left to the discretion of the state and county inspectors.

6. Defendants administer the hiring of approximately 85 part-time county inspectors, four full-time deputy state apiarists, and one full-time state apiarist. County inspectors are appointed and funded by the commis-

sioners of each county, giving the state apiarist and the Department of Agriculture little control over local hiring. Frequently state and county inspectors are business competitors of the apiary owners they inspect.

7. County and state apiary inspectors look for a number of bee diseases, the most harmful of which is the American Foul Brood (AFB) disease. AFB has been declared a public nuisance although it is not harmful to humans. *See* O.R.C. §909.03.

8. No scientific field inspection test currently exists for the detection of brood diseases. Inspectors, therefore, must rely on the visual examination of a colony for diagnosis. (*See* D. Ex. A, Apiary Inspectors Training Manual, at 16). This requires the exercise of judgmental discretion on the part of the inspector.

9. The risk and degree of damage done to a colony (i.e. crushing the queen or a large quantity of bees) by an inspector, employing proper inspection techniques, is no greater than that created by a beekeeper during normal maintenance manipulation of a colony. The use of improper inspection techniques, however, may cause substantial damage or death to the individual colony.

10. If an inspector diagnosis [sic] AFB in a colony, quarantine of the surrounding colonies or the entire apiary is ordered. (*See* O.R.C. §909.04; D. Ex. C, Notice of Order to Quarantine). A field sample is taken from the suspect colony and tested by the Department of Agriculture at its laboratory located in Reynoldsburg, Ohio. This laboratory test takes approximately one week to complete. If the test indicates AFB, the state sends the apiary owner a "Notice of Order to Destroy Bees and Appliances." (D. Ex. E). The apiary owner may appeal the decision to destroy the bees to the director of agriculture

within five days of service of such order on him. (See O.R.C. §909.16). The director's decision is final. State witnesses indicate that no appeals of this kind have ever been taken. At the expiration of the five day appeal period, the county inspector kills the bees and burns the hive equipment of the AFB diagnosed colony.

11. Under the Ohio Apiary Inspection Law, the director may eradicate dangerous bee diseases "by burning or otherwise." O.R.C. §909.03. It is the general policy of the Department of Agriculture to eradicate every case of AFB disease by burning.

12. There are conflicting opinions as to the effectiveness of the drug Terramycin (an alternative to burning) as a method of eradicating AFB infected colonies. Based upon the evidence introduced, the Court cannot draw a factual conclusion as to Terramycin's effectiveness in eradicating AFB disease. Use of the drug is, however, prevalent among Ohio beekeepers to prevent and treat infections of AFB disease.

13. The interest of the State of Ohio in maintaining the apiary inspection program is to support the production of honey and the pollination of farmers' crops by bees in Ohio.

14. The plaintiffs have for the last several years registered their apiaries with the notation on their registration forms, "no inspection without a search warrant."

15. In the spring of 1979, county inspectors conducted several inspections of plaintiffs' bees and equipment. At least two inspections were conducted outside the plaintiffs' presence and without his knowledge. As a result of these inspections, the inspectors scorched out 243 hive bodies, destroyed 2,430 frames, and burned plastic

innercovers and 5 queen excluders. Twelve live hives were also destroyed. The record indicates that the burning took place June 11, 1979 only four days after the June 7, 1987 "Notice of Order to destroy Bees" was issued. Plaintiffs filed suit in the Court of Claims of Ohio seeking damages from an alleged negligent inspection and injunctive relief against certain alleged constitutional violations of due process. The case is presently pending before the Court of Claims.

16. Plaintiffs' apiaries were last inspected by the State of Ohio in September of 1980. No disease was discovered during that inspection.

17. On April 27, 1984, Russell Lamp, a deputy bee inspector for the State of Ohio, contracted [sic] plaintiffs by telephone and advised them that he would be inspecting their apiaries pursuant to O.R.C. §909.05 without a search warrant. Plaintiff, William Allinder, on April 30, 1984, contacted Russell Lamp by phone and told him that no entry to any of his lands would be permitted without a search warrant.

18. Russell Lamp is a deputy state inspector responsible for the northwest region of Ohio, which includes 24 counties. Mr. Lamp is also a commercial beekeeper selling honey and pollinating farmers' crops. He owns approximately 700 colonies located in Ottawa, Wood, Lucas and Sandusky counties. Deputy inspector Lamp is one of the plaintiffs' competitors.

CONCLUSION OF LAW

In determining whether to grant a preliminary injunction the Court must consider four factors:

1. Whether plaintiffs have shown a strong or

substantial likelihood or probability of success on the merits;

2. Whether plaintiffs have shown irreparable harm;

3. Whether the issuance of the preliminary injunction would cause substantial harm to others;

4. Whether the issuance of the preliminary injunction would serve the public interest.

Warner v. Central Trust Co., N.A., 715 F.2d 1121 (6th Cir. 1983); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977). The Court, therefore, turns to an examination of whether plaintiffs have shown a strong or substantial likelihood or probability of success on the merits in the instant case.

Plaintiff's complaint argues that the Ohio Apiary Inspection Law, O.R.C. §909.01 *et. seq*, violates their constitutional rights to be free from (1) unlawful search and seizures and (2) taking property without due process of law. Only the unlawful search and seizure claim was addressed at the injunction hearing and in the post-hearing briefs of the parties. The Court, therefore, limits its consideration to whether the warrantless search of the plaintiffs' apiaries, pursuant to the Ohio Apiary Inspection Law, violates the Fourth Amendment's prohibition against unreasonable searches.

To begin, the Court recognizes that warrants are constitutionally required for most administrative searches. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-13 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 528-33 (1967). The Fourth Amendment's prohibitions against unreason-

able searches was extended to administrative inspections of private commercial property nearly a decade and a half ago. *Camara,* 387 U.S. at 523; *See v. City of Seattle,* 387 U.S. 541 (1967). The reason for this extension was found in the basic purpose of the amendment, which is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara,* 387 U.S. at 528.

The Fourth Amendment warrant requirement, however, is not without exception. *Donovan v. Dewey,* 452 U.S. 594 (1982); *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The United States Supreme Court recently stated:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. *See, e.g., United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that his privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *United States v. Biswell, supra,* at 316.

Donovan, 452 U.S. at 598-99 (footnote omitted). Courts have been unable to articulate a "ready test" for

determining reasonableness other than by balancing the need for the warrantless search against the businessman's privacy interest. *Camara,* 387 U.S. at 536-37. The determinative factors to be considered are, whether the state has shown a substantial need for warrantless searches, whether the industry affected is so closely regulated as to provide notice of the prospect of governmental intrusion and whether the statutory scheme enacted "provides an adequate substitute for a warrant in terms of the certainty and regularity of its application." *Donovan,* 452 U.S. at 603.

First, the Court has some doubt as to the state's need for a warrantless search. The defendants argue that warrantless searches are essential to the apiary inspection system to preserve the advantage of surprise. They assert that "[i]t would be a very simple matter for a beekeeper to remove a diseased hive from the inspector's eyes only to return it to its original position following the inspection." The argument is unpersuasive in light of the testimony of the state apiarist who stated that a vast majority of the beekeepers in Ohio are hobbyists, who are unfamiliar with the symptoms of the infectious bee diseases, and who consider the state inspection for disease to be a worthwhile service. Moreover, testimony indicated that notice to beekeepers is left to the discretion of the individual inspector. In the instant case, the deputy state inspector called the plaintiffs giving them three days notice of an inspection. The Court, therefore, questions the viability of this "surprise" argument and, in turn, questions the state's showing of need for a warrantless search.

Second, the Court must consider whether the beekeeping industry has been "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 76-77 (l970). In *Marshall v.*

Barlow's, Inc., 436 U.S. 307, 313 (1978), the Supreme Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into such a business could have a justifiable expectation of privacy. *Balelo v. Baldrige*, 724 F.2d 753, 764 (9th Cir. 1984). Liquor (*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)), firearms (*United States v. Biswell*, 406 U.S. 311 (1972)), and mines (*Donovan v. Dewey*, 452 U.S. 596 (1982)) are industries found to be "closely regulated."

The defendants assert that "the beekeeping industry in Ohio has been and continues to be closely regulated by the Ohio Department of Agriculture," and that "the individual beekeepers are aware of the requirements for periodic inspection." (D. Memo. at 13). Testimony presented at the evidentiary hearing, however, does not support these assertions. The state apiarist testified that less that 100% of the beekeepers in Ohio are registered and that only 85 to 90% of those registered are inspected every year. He testified further that the typical reason for failure to register colonies is beekeepers who are unaware of the registration and inspection requirements. Although the State of Ohio has been registering and inspecting bee colonies since the 1930's, the state's evidence fails to prove that such regulation had the pervasiveness and regularity necessary to affect the individual proprietor's legitimate "expectation of privacy." Unlike the federal government's control over the alcohol, firearms, and mining industries, the beekeeping industry is not "pervasively regulated" by the Department of Agriculture under the Ohio Apiary Inspection Law. *See Dow Chemical Co. v. U.S.*, 536 F. Supp. 1355 (E.D. Mich 1982).

Third, the Court must examine the statutory scheme to determine whether it provides "an adequate substitute

for a warrant in terms of certainty and regularity of its application." *Donovan,* 452 U.S. at 603. The record indicates that unlike the Coal Mine Safety and Health Act (*Donovan*) which provided a predicable, defined regulatory presence, the Ohio Apiary Inspection Law leaves the frequency of inspections to the unchecked discretion of the local inspectors. The apiary statute gives the field inspectors unbridled discretion as to when to search and whom to search. Upon this preliminary review, the Court must conclude that the Ohio statute, *sub judice,* is most analogous to the OSHA regulatory scheme examined in *Marshall v. Barlow's Inc.,* 436 U.S. at 307. In *Barlow's* the Supreme Court held OSHA's warrantless inspection program unconstitutional. 436 U.S. at 325.

In a typical commercial setting, the businessmen's expectation of privacy is rarely at issue in an administrative inspection case. In the instant case, however, the plaintiffs' commercial setting consists of bee colonies placed on separate parcels of land, located in four Ohio counties. Given the atypical nature of this case, the Court must consider whether the plaintiffs have a reasonable expectation of privacy in light of the "open fields" doctrine of *Hester v. United States,* 265 U.S. 57 (1924) and its progeny.

The United States Supreme Court recently reaffirmed *Hester* in *Oliver v. United States,* 52 L.W. 4425 (U.S. April 17, 1984). In this case, police discovered marijuana planted on a secluded section of the petitioner's farm, in a fenced area with no trespassing signs posted around the property. Granting a motion to suppress evidence, the district court concluded that this was not an "open" field because the petitioner "had done all that could be expected of him to assert his privacy in the area of the farm that was searched." *Id.* at 4426. The Court of Appeals for the Sixth Circuit reversed the district court.

The Court of Appeals reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields. *Id.* at 4426. The United States Supreme Court affirmed this finding concluding that the petitioner's asserted expectation of privacy in the open field "is not an expectation that 'society recognizes as reasonable.'" *Id.* at 4427. The Supreme Court stated:

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the policy [sic] in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas.

Id. at 4428. The *Oliver* case focuses on the legitimate "expectation of privacy" of the person whose "open field" was being searched. The Supreme Court examined the petitioner's legitimate privacy interest and concluded that none existed.

> It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marijuana upon secluded land and erected fences and no trespassing signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marijuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was *legitimate* in the sense required by

> the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. *Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.* As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Id. at 4429 (emphasis added). Footnote 13 of the opinion appears to be particularly illustrative of the Court's rationale, where it states: "Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post no trespassing signs." *Id* at 4429.

It is clear to the Court that the "open fields" doctrine as enunciated in *Oliver* is not applicable to the instant case. Unlike the criminal activity discovered in *Oliver,* the commercial activity of the plaintiffs' is both legal and valuable to society. Beekeeping, by its very nature, must be performed outside and in a natural setting. Legitimate commercial activities which cannot be completely confined or enclosed (i.e. lumber yards, sand mines and rock quarries) remain within the protection of the Fourth Amendment. The opinion in *Oliver* does not conclude that every activity carried on in an open field is outside constitutional protection. Rather, the Supreme Court stated that "the correct inquiry [to determine the *legitimacy* of the expectation of privacy] is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver,* 52 L.W. at 4429. At this juncture, the Court must conclude that beekeeping is among those commercial activities performed in an open field with a legitimate expectation of privacy which society recognizes as reasonable.

Based upon the foregoing findings the Court must conclude plaintiffs have shown a substantial likelihood of success on the merits of the instant case.

The above exhaustive review of the merits of this case was mandated by the fact that the Court presently questions the existence of material issues of fact concerning the constitutionality of the Ohio Apiary Inspection Law. It appears that no factual issues exist. Nonetheless at this preliminary stage, the Court is unable to issue an injunction on behalf of the plaintiffs. After careful consideration of the evidence presented, the Court concludes that plaintiff failed to show the required irreparable harm. The facts indicate that the risk and degree of damage done to a colony (i.e. crushing the queen or a large quantity of bees) by an inspector is no greater than that created by a beekeeper during normal maintenance manipulation of a colony. It appears clear that manipulation of the frames within the hive is a routine risk of business in the beekeeping industry. The Court concludes that plaintiffs' business will suffer no harm beyond the possibility of repair or compensation in damages. Accordingly, irreparable harm has not been shown.

Because I find that plaintiffs have not met the second "prong" of the traditional test for a preliminary injunction, the Court need not reach the other two factors outlined above. For the foregoing reasons, it is

ORDERED that plaintiffs' motion for preliminary injunction is denied.

FURTHER ORDERED that this cause is set for non-jury trial on December 6, 1984 at 9:00 A.M.

/s/ Nicholas J. Walinski
UNITED STATES DISTRICT JUDGE

Toledo, Ohio. July 27, 1984

APPENDIX D

No. C 85-7542

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELMER J. STEINER, et al.,
Plaintiffs,

v.

STATE OF OHIO, et al.,
Defendants.

Filed September 6, 1985

Before: Judge John W. Potter

Stipulation

Now comes [sic] the parties to this action, through counsel who hereby stipulate as follows:

(1) Elmer and Marilyn Steiner are commercial beekeepers and maintain approximately 850 hives in Hancock and Hardin counties in Ohio and have registered such hives with the Ohio Department of Agriculture pursuant to Section O.R.C. 909.01 *et seq.* The Steiners have for the past several years written "No inspections without a search warrant" on their Apiary registration form.

(2) The Memorandum and Order by Judge Walinski on July 19, 1985 in *Allinder, et al. vs. State of Ohio, et al.,*

Case No. C 84-7395 shall become the Memorandum and Order in these proceedings.

(3) The record in these proceedings shall consist of the following:

(A) All original papers filed.

(B) The Memorandum and Order set out in paragraph 2 above.

(C) The transcript of the proceedings held on May 9 and 10, 1985 in *Allinder et al. vs. State of Ohio, et al,* being a transcript on Plaintiff's Motion for Preliminary Injuction, except to the extent that such transcript relates to the operations of or facts unique to William P. Allinder and Caroline I. Allinder.

(4) This case and *Allinder vs. State of Ohio,* Case No. C 84-7395 shall be consolidated for purposes of appeal and for trial on all remaining issues in those cases.

(5) The parties further stipulate that all further appeal (s) from decisions of the magistrate shall be appealed to [the] Sixth Circuit Court of Appeals and not to the District Judge.

/s/ Judge John W. Potter

/s/ Gregory L. Arnold
Attorney for Plaintiffs

/s/ John K. Maguire
Attorney for Defendants

APPENDIX E

Nos. 85-3664 & 85-3807

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM P. ALLINDER and
CAROLINE I. ALLINDER d/b/a
SUNNYSIDE BEE FARM; ELMER
STEINER and MARILYN L. STEINER
Plaintiffs-Appellees,

v.

STATE OF OHIO; OHIO DEPARTMENT
OF AGRICULTURE; DALE LOCKER,
DIRECTOR OF OHIO DEPARTMENT OF
AGRICULTURE; ERIC NELSON,
HARDIN COUNTY BEE INSPECTOR,
Defendants-Appellants.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE
UNITED STATES
BY THE
STATE OF OHIO, ET. AL.

Notice is hereby given that the State of Ohio; Ohio Department of Agriculture; Dale Locker, Director of Ohio Department of Agriculture; and Eric Nelson, Hardin County Bee Inspector, hereby appeal to the Supreme Court of the United States from the decision and judg-

ment of this Court filed on January 8, 1987 holding §909.05 of the Ohio Revised Code to be unconstitutional. The appeal is taken pursuant to 28 U.S.C. §1254(2).

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

By: Peter D. Patitsas
Assistant Attorney General
30 East Broad Street
State Office Tower, 10th Floor
Columbus, Ohio 43266-0410
(614) 466-2980

/s/ PATRICK A. DEVINE*
Assistant Attorney General
30 East Broad Street
State Office Tower, 10th Floor
Columbus, Ohio 43266-0410
(614) 466-2980
*Counsel of Record in the Supreme Court of the United States

Filed March 20, 1987

APPENDIX F

TEXT OF STATUTES INVOLVED

Ohio Revised Code Chapter 909

§909.01 **Definitions.**

As used in sections 909.01 to 909.18, inclusive, of the Revised Code:

(A) "Person" includes corporations, companies, societies, associations, partnerships, any individual or combination of individuals, or any institution, park, or other public agency administered by the state or by any district, county, municipal corporation, or other governmental subdivision thereof. When construing or enforcing such sections, the act, omission, or failure of any officer, agent, servant, or other individual acting for or employed by any person as above defined within the scope of his employment or office is deemed to be the act, omission, or failure of such person, as well as that of the officer, agent, servant, or other employee.

(B) "Bees" means any stage of any species of the genus Apis.

(C) "Bee diseases" means American or European foul brood, sacbrood, bee paralysis, disappearing disease, Isle of Wright disease, or any other disease or abnormal condition of the eggs or of the larval, pupal, or adult stages of the bees.

(D) "Apiary" means any place where one or more colonies or nuclei of bees are kept.

(E) "Queen apiaries" means any apiary in which queen bees are reared for sale or gift.

(F) "Hive" means any modern frame hive, box hive, box, barrel, log gum, skep, or any other receptacle, natural or artificial, or any part thereof, which may be used as a domicile for bees.

(G) "Appliances" means any used hives or parts thereof, used frames, used honey houses, used tools, used machines, used devices, or used equipment employed in the handling or manipulation of bees, honey, or beeswax, or any used container for honey or beeswax which may be used in any apiary.

§909.02 **Application for registration; certificate.**

Any person owning or possessing bees shall on or before the first day of June of each year, or thereafter within ten days after coming into ownership or possession of bees, or upon moving bees into this state from outside the state, file with the director of agriculture an application for registration setting forth the exact location of his apiaries and the number of colonies of bees in each apiary, together with such other information as is required by the director, and accompanied by a registration fee of one dollar for each separate apiary owned or possessed by him at time of registration. Upon acceptance of said application, the director shall issue to such person a certificate of registration. All certificates issued in accordance with this section expire on the thirty first day of May next following date of issuance or renewal, and shall be renewed according to the standard renewal procedure of sections 4745.01 to 4745.03, inclusive, of the Revised Code.

No person shall maintain an apiary located on pre-

mises other than that of his residence unless such apiary is identifiable by an apiary identification number assigned to such person by the director. Such identification number shall be posted in a conspicuous location in the apiary. The moving, raising, and production of bees, beeswax, honey, and honey products shall be deemed an agricultural pursuit.

§909.03 **Rules for control and prevention of disease.**

The director of agriculture may make and enforce such rules and orders as in his judgment are necessary to control, eradicate, or prevent the introduction, spread, or dissemination of any bee diseases. In the control or eradication of dangerous bee diseases, the director may destroy by burning or otherwise any infected bees, hives, honey, or appliances that he deems necessary for such control or eradication, without renumeration to the owner. Such infected bees, hives, honey and appliances are a public nuisance.

§909.04 **Director of agriculture may quarantine.**

Under section 909.01 to 909.18, inclusive, of the Revised Code, the director of agriculture may establish and maintain quarantines prohibiting the shipment into or within the state, or any subdivision thereof, of any bees, queen bees, used hives or any part thereof, used appliances, or any material capable of transmitting any bee diseases, for such periods and under such conditions as he deems necessary to control, eradicate, or prevent the introduction, spread, or dissemination of any bee diseases, giving such notice thereof as is prescribed by him. During the existence of such order no person shall remove or ship from such area any such material except by special permission or order of the director; provided that before the director promulgates the order

mises other thanof quarantine as provided in this section, he shall, after due notice to interested person, give a public hearing under such rules and regulations as he prescribes, at which hearing any interested person may appear and be heard, either in person or by attorney.

§909.05 **Power to enter upon premises.**

To enforce sections 909.01 to 909.18, inclusive, of the Revised Code, the director of agriculture or his authorized representatives shall have access to and egress from any apiary or to any premises, buildings, or any other place, public or private, in which he has reason to believe that bees, honey, wax, used hives, or used appliances are kept. No person shall resist or hinder the director or his authorized representative in the discharge of their duties under such sections. No occupied dwelling may be entered without a search warrant.

§909.06 **State apiarist and deputies.**

The director of agriculture shall appoint a competent entomologist as state apiarist and such number of deputy state apiarists as are necessary to carry out sections 909.01 to 909.18, inclusive, of the Revised Code. Said state apiarist and deputy state apiarists shall be vested with the powers of police officers in the enforcement of such sections, and shall be furnished with official badges or other insignia of authority which shall be carried while on duty.

§909.07 **Board of county commissioners may appropriate funds for inspections; deputy apiarist; report.**

The board of county commissioners may appropriate such funds as it deems sufficient for the inspection of apiaries in its county. It may appoint a deputy apiarist with

the consent and concurrence of the director of agriculture, said deputy to serve during the pleasure of said board except as specified in this section. Such deputy shall be paid such salary as the county commissioners determine for each day, or for each half day of inspection work actually done, together with such expenses as are necessarily incurred in the doing of the inspection work. Before the board approves said salary and expenses for payment, such deputy shall submit the same to the director for his approval. Such deputy shall work under the direction of the director and shall be responsible to him for the enforcement of sections 909.01 to 909.18, inclusive, of the Revised Code. The director may terminate the appointment of any deputy upon submitting to the board a statement that such deputy has shown himself to be incompetent, inefficient, or untrustworthy in the discharge of his duties. Such deputy shall furnish to the director such reports as are required and upon blanks furnished by him. A duplicate of such reports shall be presented to the board each time that a statement of salary and expense is presented for payment.

§909.08 **Annual inspection of queen apiaries; certificate.**

Each person within the state engaged in the rearing of queen bees for sale or gift shall before the first day of April of each year file with the director of agriculture a request for the inspection of his apiaries in which queen bees are reared. The director shall cause all queen apiaries to be inspected at least once each year. If such inspection shows the presence of any bee disease in any queen apiary, the owner thereof shall not ship, sell, or give away any queen bees until he has destroyed such infection to the satisfaction of the director. When such infection has been removed from the infected queen apiary, or if no infection is found, the director shall issue a certificate, signed by the state apiarist, a copy of which

shall be attached to each package or shipment of queen bees mailed or shipped. Such certificate shall be valid for not to exceed one year. The use of tags or other devices bearing an invalid or altered certificate and the misuse of any valid certificate is hereby prohibited.

§909.09 **Permit necessary to transfer.**

No person shall sell, offer for sale, give, offer to give, barter, or offer to barter any bees, honeycombs, or used beekeeping appliances without a permit from the director of agriculture. Such permit, or copy of such permit, shall accompany any such transfer of ownership. The director may refuse such permit until he finds by inspection that said bee, honeycombs, or used beekeeping appliances are apparently free from any contagious or infectious diseases of bees.

This section does not apply to the transfer of ownership of honeycomb for human consumption, or of live bees in cages without combs or honey.

§909.10 **Shipment of bees into this state.**

The shipment or movement of bees, honeycomb, or any used beekeeping appliances into this state from any other state or country is hereby prohibited, except when accompanied by a certificate signed by the state apiarist or corresponding official of the state or country wherein shipment or movement originated stating that the apiary in which such bees, honeycomb, or used beekeeping appliances originated has been inspected and found apparently free from contagious and infectious diseases of bees, and except when accompanied by a permit issued by the director of agriculture approving such shipment or movement into this state. In the absence of facilities for such inspection and certification in such

other state or country, the director may issue a permit for the shipment or movement into this state of such bees, honeycomb, or used beekeeping appliances upon the presentation of suitable evidence by the shipper showing that commodities included are not likely to convey any contagious or infectious diseases of bees.

The requirement for a permit to ship or move bees, honeycomb, or used beekeeping appliances into this state does not apply to the shipment or movement of live bees in cages without combs or honey.

§909.11 **Removal of bees prohibited if American foul brood disease exists.**

The removal of any bees, honeycombs, honey, or used beekeeping appliances from any apiary wherein the American foul brood disease is known to exist is prohibited until the director of agriculture has determined and declared that the disease is apparently eradicated. The removal of any bees, honeycombs, honey, or used beekeeping appliances may be made from any such apiary, under a special permit signed by the state apiarist, when properly safeguarded to prevent dissemination of such disease.

§909.12 **Frames and honeycombs must be easily removable and accessible.**

No person shall keep or maintain bees in any hive if all frames and honeycombs cannot be readily removed therefrom for inspection or keep or maintain bees in any hive situated where adequate and efficient inspection is difficult, impracticable, or impossible. All cross-comb hives or domiciles for bees, from which the frames and honeycombs cannot be readily removed, are hereby declared to be a public nuisance.

If any owner is found using such cross-comb hives or domiciles, the director of agriculture shall notify said owner in writing to cease using them. If, after the expiration of one year from receipt of said notice, the owner has failed to cease using said cross-comb hives or domiciles for housing bees, the director may seize and destroy them without remuneration.

§909.13 **Revocation of certificate or permit.**

The director of agriculture, in accordance with section 119.01 to 119.13, inclusive, of the Revised Code, may revoke any certificate or permit issued under sections 909.01 to 909.18, inclusive, of the Revised Code, for cause, including any violation of such sections or nonconformity with any rule or order promulgated under such sections in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code. There shall be no revocation of a certificate or permit until the certificate or permit holder first is given an opportunity for a hearing by the director in regard thereto in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code. An appeal may be taken from the action of the director in revocation of a certificate or permit to the court of common pleas as provided in section 119.12 of the Revised Code.

§909.14 **Annual report.**

The director of agriculture may publish an annual report and such other information concerning the inspection of bees, or bee diseases, as he deems necessary to the carrying out of sections 909.01 to 909.18, inclusive, of the Revised Code. He shall, from time to time, publish all rules or orders promulgated under such sections.

§909.15 **[Disposition of fees and fines.]**

All moneys from registration fees and from fines imposed and recovered under section 909.01 to 909.18 of the Revised Code, shall be paid to the director of agriculture, who shall deposit such moneys in the state treasury to the credit of the general revenue fund.

§909.16 **Appeal.**

Any person in interest or affected by any order of the director of agriculture, or state apiarists, may appeal therefrom to the director within five days of the service of such order upon him setting forth in writing specifically and in full detail the order on which a hearing is desired, and every reason why such order is deemed unreasonable.

On receipt of such appeal, the director shall with reasonable promptness order a hearing thereon, and consider and determine the matters in question. Notice of the time and place of hearing shall be given to the petitioner and to such other persons as the director may direct. Such appeal shall suspend the operation of the order appealed from except as to the orders of the director promulgating a quarantine as provided in section 909.04 of the Revised Code. All hearings of the director shall be open to the public, and his decisions shall be final. The appellant may be represented by an attorney.

§909.17 **Director of agriculture to prosecute violators.**

The director of agriculture of his representatives shall prosecute all violations of sections 909.01 to 909.18, inclusive, of the Revised Code, before any court of competent jurisdiction in the county in which the violation occurs or person accused thereof resides. The com-

plainant shall not be required to give security for costs. The prosecuting attorney of each county, or the attorney general, shall conduct such prosecutions.

§909.18 **Prohibition.**

No person shall violate sections 909.01 to 909.18, inclusive, of the Revised Code, or any rule or order of the director of agriculture promulgated under sections in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code.

§909.99 **Penalty.**

(A) Whoever violates section 909.18 of the Revised Code shall be fined not less than ten nor more than fifty dollars for the first offense; for each subsequent offense such person shall be fined not less than fifty nor more than two hundred dollars.

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1649

In The
Supreme Court of the United States
October Term, 1986

THE STATE OF OHIO; THE OHIO DEPARTMENT OF AGRICULTURE; DALE LOCKER, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE; ERIC NELSON, HARDIN COUNTY BEE INSPECTOR,

Appellants,

v.

WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER D/B/A SUNNYSIDE BEE FARM; ELMER J. STEINER AND MARILYN L. STEINER,

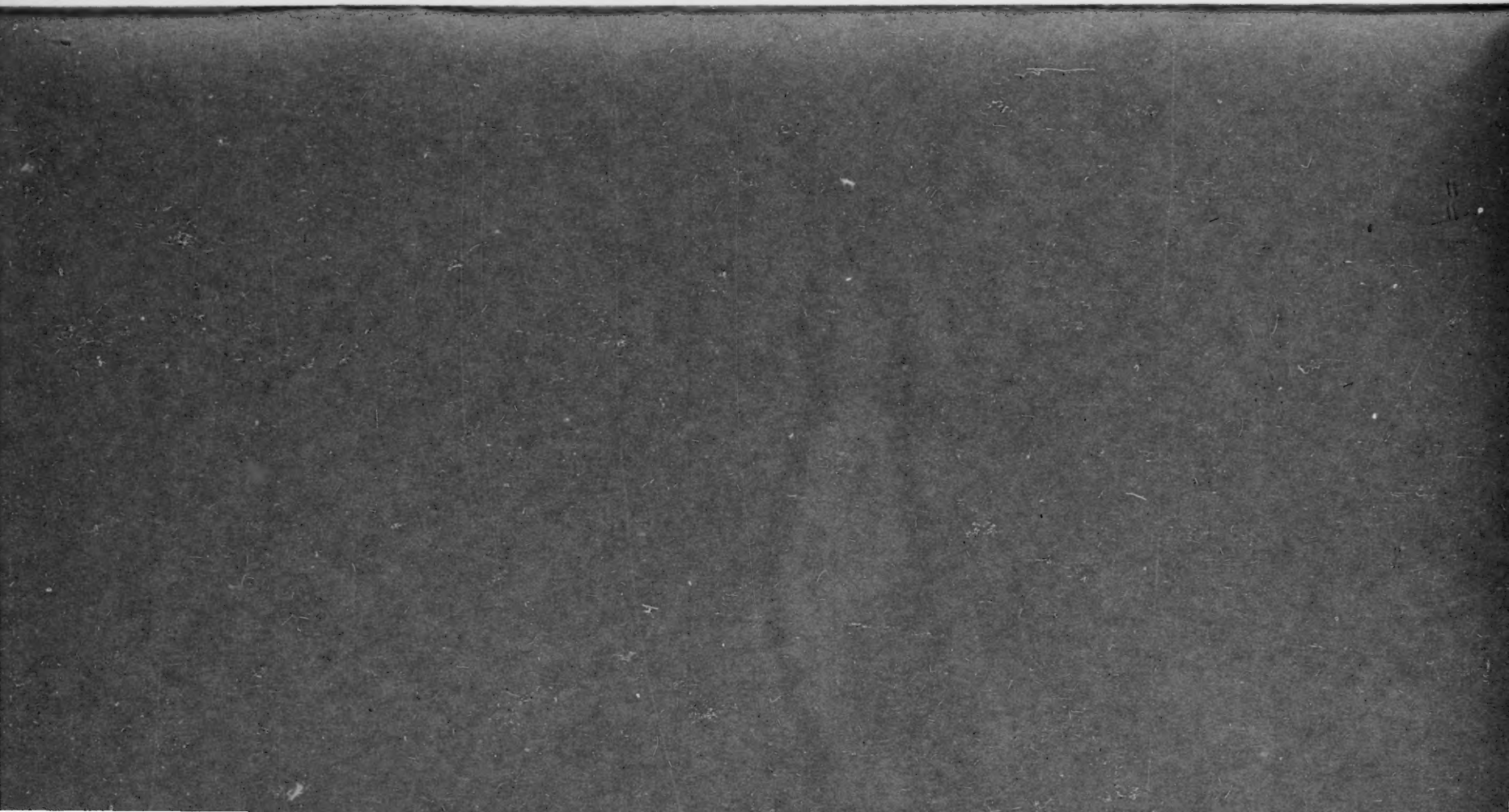
Appellees.

On Appeal From
The United States Court Of Appeals
For The Sixth Circuit

MOTION OF APPELLEES WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER D/B/A SUNNYSIDE BEE FARM AND ELMER J. STEINER AND MARILYN I. STEINER TO DISMISS OR AFFIRM

*Gregory L. Arnold
David C. Barrett, Jr.
ARNOLD & BARRETT
425 Jefferson Avenue
Suite 804
Toledo, Ohio 43604
Ph: (419) 241-4441
**Counsel of Record for Appellees*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831



I. QUESTIONS PRESENTED BY APPELLEES MOTION TO DISMISS

A. Whether Appellants have failed to perfect a proper appeal where Appellants' question presented in its jurisdictional statement is not the issue decided by the Court of Appeals?

B. Whether any of the Appellants have standing to pursue this appeal in light of the question presented by Appellants' jurisdictional statement?

C. Whether 28 U.S.C. Section 1254(2) permits appeal of an interlocutory order to this Court?

II. QUESTION PRESENTED BY APPELLEES MOTION TO AFFIRM

Whether Appellants have raised a substantial question for review by this Court where the lower courts' decisions in this case are consistent with the decisions of this Court holding that the Fourth Amendment to the Constitution of the United States prohibits nonconsensual warrantless inspections of business premises?

PARTIES TO PROCEEDINGS BELOW

William P. Allinder and Caroline I. Allinder, plaintiffs below and appellees herein, are commercial beekeepers in the business of raising bees for honey production and crop pollination.

Elmer J. Steiner and Marilyn L. Steiner, plaintiffs below and appellees herein, are commercial beekeepers in the business of raising bees for honey production.

The State of Ohio, The Ohio Department of Agriculture, Dale Locker, Director of the Ohio Department of Agriculture and Eric Nelson, Hardin County Bee Inspector are appellants herein.

The Allinders own 600 hives and the Steiners own approximately 850 hives, all of which are located in seven northwest Ohio counties.

The parties in the Steiner action stipulated that the order entered in the Allinder case would apply in the Steiner action, and the two actions were consolidated for appeal.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to Proceedings Below	ii
Motion of Appellees To Dismiss or Affirm	1
Statutory Provision Involved	1
Statement of the Case	2
Argument	3
Conclusion	16

TABLE OF AUTHORITIES

Page

CASES

Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974) 11

Allinder v. Ohio, 614 F.Supp. 282 (N.D. Ohio 1985) aff'd 808 F.2d 1180 (6th Cir. 1987) ..... *passim*

Arkansas v. Sanders, 442 U.S. 753 (1979) 13

Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174 (1985) 3

Camara v. Municipal Court, 387 U.S. 523 (1967) 9, 13

Chicago v. Atchison & T.S.F.R. Co., 357 U.S. 77 (1958) 8

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 15

Donovan v. Dewey, 452 U.S. 594 (1981) 12, 14, 15

Dow Chemical Co. v. United States, — U.S. —, 106 S.Ct. 1819 (1986) 9, 11, 12, 15

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Ex parte Leaf Tobacco Board, 222 U.S. 578 (1911) 5

Ex parte Young, 209 U.S. 123 (1908) 5, 6

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 13

International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield, 382 U.S. 205 (1965) 5

Katz v. United States, 389 U.S. 347 (1967) 11

Maine v. Thornton, 466 U.S. 170 (1984) 11, 12

Mancusi v. DeForte, 392 U.S. 364 (1968) 13

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 9, 13, 15, 16

Michigan v. Tyler, 436 U.S. 499 (1978) 13

TABLE OF AUTHORITIES—Continued

Page

National Theaters Corp. v. Bertha Building Corp., 361 U.S. 960 (1960) 7

Oliver v. United States, 466 U.S. 170 (1984) 11, 12

Pacific Union Conference v. Marshal, 434 U.S. 1305 (1977) 7

See v. City of Seattle, 387 U.S. 541 (1967) 9, 13, 14

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 6

Slaker v. O'Connor, 278 U.S. 188 (1929) 8

South Carolina Electric & Gas Co. v. Fleming, 351 U.S. 901 (1956) 8

Tully v. Mobil Oil Corp., 455 U.S. 245 (1982) 3

United States v. Biswell, 406 U.S. 311 (1972) 15

United States v. Chadwick, 433 U.S. 1 (1977) 13

MISCELLANEOUS:

Report of the Study Group on the Caseload of the Supreme Court, 1972, 57 F.R.D. 573, 595-605 3

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, Section 3920 (1977) 7

Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction*, Section 4037 (1978 and Suppl. 1986) 6

28 U.S.C. Section 1254(2) 1, 3, 4, 5, 6, 7, 16

28 U.S.C. Section 1292(a)(1) 6

Ohio Rev. Code Section 909.03 7

Ohio Rev. Code Section 909.05 ..... 2, 8, 13

Ohio Rev. Code Section 909.16 7

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellees William P. Allinder and Caroline I. Allinder d/b/a Sunnyside Bee Farm and Elmer J. Steiner and Marilyn L. Steiner move to dismiss this appeal or, alternatively, snummarily affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

The motion to dismiss is grounded on the fact that appellants have failed to perfect a proper appeal to the Court and appellants lack standing to pursue the question presented in their jurisdictional statement.

Further, even if appellants' Question presented is modified to correctly state an issue in dispute, other issues remaining to be decided between these parties in the United States District Court for the Northern District of Ohio, Western Division, below should be decided prior to the Supreme Court addressing the issues presented in Appellants' Jurisdictional Statement. Interlocutory decisions are not proper subjects for appeal to this Court under 28 U.S.C. § 1254(2).

Finaliy, Appellees' Motion to Affirm is based on the fact that no substantial question for review has been presented by appellants to this court.

———o———

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. Section 1254(2) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . a party relying on a state statute

held by the court of appeals to be invalid as repugnant to the Constitution . . . of the United States . . . and *the review on appeal shall be restricted to the federal questions presented* [emphasis added]."

STATEMENT OF THE CASE

This case involves a fourth amendment challenge to the scope of Section 909.05 of the Ohio Revised Code (ORC) which empowers the Ohio Director of Agriculture or his authorized representative to conduct warrantless searches of apiaries and other premises, buildings or places where bees or bee paraphernalia are kept.

After notification of a planned warrantless inspection of their apiaries, the plaintiff-beekeepers commenced separate actions for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio. The district court granted the plaintiffs' motion for partial summary judgment in the Allinder action and permanently enjoined the Ohio Department of Agriculture from "conducting warrantless, nonconsensual inspections of apiaries pursuant to the Ohio Apiary Inspection Law, ORC Section 909.05" on the grounds that the law is unconstitutional "insofar as it purports to authorize nonconsensual apiary inspections without a warrant or its equivalent." *Allinder v. Ohio,* 614 F. Supp. 282 (N.D. Ohio 1985).

The Steiners and appellants-defendants stipulated that the order entered in the Allinder action would apply in the Steiner action, and that the two actions would be con-

solidated for purposes of appeal and trial on the remaining issues.

Defendants appealed from the injunctive orders in both cases. The Court of Appeals for the Sixth Circuit consolidated the two actions on appeal. The Court of Appeals affirmed the District Court in substantial part. *Allinder v. Ohio,* 808 F.2d 1180 (6th Cir. 1987).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED

A. The Appellants Have Failed To Perfect A Proper Appeal To This Court Because The Question Presented In The Jurisdictional Statement Is Not The Issue Decided By The Court Of Appeals.

The appellants attempt to invoke the jurisdiction of this court pursuant to 28 U.S.C. Section 1254(2) which authorizes review by appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution of the United States.

However, when a party seeks an appeal by this method, the review on appeal shall be restricted to the federal question presented. *Tully v. Mobil Oil Corp.,* 455 U.S. 245 (1982). The restriction contained in 28 U.S.C. Section 1254(2) is consistent with the sound policy of limiting the burden of appeals heard by this Court. *See eg.* Report of the Study Group on the Caseload of the Supreme Court, 1972, 57 F.R.D. 573, 595-605; *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 2181 n.12, 471 U.S. 462, 470-71 n.12 (1985).

In its Jurisdictional Statement filed with this Court, the appellants presented their singular question as follows:

> WHETHER A STATE IS PROHIBITED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FROM CONDUCTING NONCONSENSUAL, WARRANTLESS ADMINISTRATIVE INSPECTIONS OF PROPERTY SUCH AS AN APIARY.

In the district court, appellees named as defendants, the State of Ohio, the Ohio Department of Agriculture, Dale Locker, Director of the Ohio Department of Agriculture and Eric Nelson, Hardin County Bee Inspector.

As the Court of Appeals for the Sixth Circuit stated:

> The Supreme Court has consistently interpreted the Eleventh Amendment to preclude a citizen from bringing suit against his own state in a federal court. *Edelman v. Jordon,* 415 U.S. 651 (1974) . . . The State of Ohio . . . must be dismissed as defendants for lack of jurisdiction.

Allinder v. Ohio, 808 F.2d at 1184.

As a result of the decision by the court of appeals below, no issue of dispute exists on the question presented by the Appellants herein since the "State" was dismissed as a party.

Since an appeal under 28 U.S.C. Section 1254(2) must be restricted to the question presented, appellants' appeal must be dismissed as presenting a question upon which there is no dispute. Appellees have not cross-appealed from the decision of the court of appeals dismissing the State of Ohio as a party over which the district court has no jurisdiction.

B. The Appellants Lack Standing To Pursue The Instant Appeal In Light Of The Question Presented In Appellants' Jurisdictional Statement.

The provisions of 28 U.S.C. Section 1254(2) clearly provide that review on appeal to this Court "shall be restricted to the Federal questions presented." The Federal question presented by appellants' jurisdictional statement precludes review by appeal in this case.

The State of Ohio and the Ohio Department of Agriculture were dismissed as parties to the case by the Court of Appeals for the Sixth Circuit. *Allinder,* 808 F.2d at 1184. Section 1254(2) permits only parties to appeal. Thus, those two (2) appellants are no longer parties to the case and cannot seek review by appeal in this Court. *See eg. Ex parte Leaf Tobacco Board,* 222 U.S. 578, 581 (1911); *International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield,* 382 U.S. 205, 208-09 (1965).

The Director of the Ohio Department of Agriculture and the Hardin County Bee Inspector were retained as proper parties to the case under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908) by the court of appeals. *Allinder,* 808 F.2d at 1184.

While the two (2) individual appellants remain parties to the action, the question presented by appellants jurisdictional statement is framed in a manner which addresses only the State of Ohio's (a non-party's) interest.

Consequently, the individual appellants (the only persons still parties to the case) have not framed an issue for this Court to determine on appeal. A suit challenging

the federal constitutionality of a state officials' action is not one against a state. *Ex parte Young* at 159-160.

The interplay of the limited appellate jurisdiction granted by 28 U.S.C. Section 1254(2) to the Federal question presented combined with the express requirement that only a party may appeal to this Court provides a sound and just reason to dismiss appellants' attempt to invoke the jurisdiction of this Court. It is the Court's long-standing policy that "statutes authorizing appeals are to be strictly construed." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984).

C. An Appeal Of An Interlocutory Decision Is Not Permitted By 28 U.S.C. Section 1254(2) Especially Where There Remain Several Issues In Dispute And For Decision In The United States District Court Below In This Case And The Supreme Court's Review, If Any, Should Be Reserved Until All Such Issues Are Decided By The District Court And Court of Appeals For The Sixth Circuit.

The appellants in this action brought their appeal of the district court's interlocutory decision in the court of appeals below pursuant to 28 U.S.C. Section 1292(a)(1).

By enacting the Interlocutory Appeals Act of 1958, Congress modified the traditional final judgment rule allowing immediate appeals to a court of appeals from a federal district court. See generally, Wright, Miller, Cooper & Gressman, *Federal Practice & Procedure: Jurisdiction* § 3920 (1977).

As such, a judgment rendered in a case arising under the Interlocutory Appeals Act is non-final in nature. *Id.*

While Congress has permitted an interlocutory appeal to a court of appeals, the Act does not require a review by this Court of such interlocutory judgments. *National Theaters Corp. v. Bertha Building Corp.*, 361 U.S. 960 (1960). History and sound policy illustrate that finality is a condition precedent to invoking the jurisdiction of 28 U.S.C. Section 1254(2). *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, Section 4037 (1978 and Suppl. 1986).

In this case, several substantial federal issues remain to be decided in the United States District Court below. "The policy against piecemeal interlocutory appeal is a strong one". *See Pacific Union Conference v. Marshall*, 434 U.S. 1305, 1309 (1977).

The issues yet to be ruled on by the district court include appellees-plaintiffs' request that Ohio Rev. Code Section 909.03 be declared unconstitutional to the extent that it provides authority to the Ohio Department of Agriculture to burn appellees-plaintiffs' property when less restrictive alternatives exist for the eradication of bee diseases, that Ohio Rev. Code Section 909.16 be declared unconstitutional in that it does not provide for an independent and unbiased review of the orders of the director [of agriculture] since the director reviews his own orders, and a request by the appellees to have the actions of the State of Ohio, Ohio Department of Agriculture and the Director of Agriculture in allowing competitors as bee inspectors to be declared violative of appellees' rights pursuant to the Fifth Amendment to the United States Constitution.

The substantial federal issues yet to be decided in the courts below increase the likelihood that further appeals

by the non-prevailing party may result with eventual petitions for review in this court.

Judicial economy and the favored policy of avoiding multiple appeals in the same case should control and this appeal should be dismissed. *Slaker v. O'Connor,* 278 U.S. 188, 189 (1929); *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901 (1956); *Chicago v. Atchison & T.S.F.R. Co.,* 357 U.S. 77, 82-83 (1958).

II. THE DECISION OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED

Appellants Have Raised No Substantial Question For Review By This Court And The Decisions In The District Court And The Court Of Appeals For The Sixth Circuit Below Are Clearly Correct And Consistent With This Court's Long Standing Interpretation Of The Fourth Amendment.

The lower courts concluded that ORC Section 909.05 was unconstitutional to the extent it authorized nonconsensual warrantless inspections of appellees' beehives in this case. The court of appeals found the statute repugnant to the Constitution because, "under ORC Section 909.05, an inspector is authorized to examine apiaries without prior notice, without a warrant and outside the presence of the owners." *Allinder,* 808 F.2d at 1183.

The appellants have failed to raise a substantial question for review by this Court where the court of appeals decision is consistent with the decisions of this Court holding that the Fourth Amendment to the Constitution of the United States prohibits nonconsensual warrantless inspections of business premises. Should this Court decide that

appellants appeal is properly before the Court, this case is one eminently appropriate for summary affirmance.

Physical invasion of a businessman's property without a warrant under facts similar to those present here has been consistently found to violate the protections guaranteed by the Fourth Amendment. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Dow Chemical Co. v. United States,* 106 S.Ct. 1819, 1826, — U.S. — (1986) citing *See v. City of Seattle,* 387 U.S. 541, 543 (1967).

The Supreme Court of the United States has on numerous occasions determined that a search warrant is required as part of due process in administrative inspection cases and that warrantless searches are generally unreasonable. This rule applies to commercial premises as well as houses. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle, supra; Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978).

The insubstantiality of this appeal is amply demonstrated by the facts of this case which were clearly established at the district court.

The following facts indicate the correctness of the lower courts' ruling and the conformance of those rulings with this Court's past decisions:

a. Not all beekeepers in Ohio register their apiaries. *Allinder,* 808 F.2d at 1183.

b. American Foulbrood Disease (AFB) is not harmful to humans. Id.

c. Inspectors are often business competitiors of those whom they inspect. Id.

d. An inspector is expressly authorized, under O.R.C. 909.05 to examine apiaries without prior notice, without a warrant and outside the presence of the owners. Id.

e. There are no published rules and regulations on inspection and the final decision as to what to inspect, how to inspect and when to inspect rests with the individual inspectors. Id.

f. Inspection involves manipulation of the hive *and not mere visual inspection of the exterior of an apiary. The inspector . . . removes the lid* [*of the hive*] *with a crowbar-like hive tool* [emphasis added]. Id.

g. If the inspector diagnoses AFB, surrounding colonies or sometimes the entire apiary is quarantined. Id.

h. If the presence of AFB is confirmed, the bees and hive equipment are ordered destroyed by burning. Id.

The following determinations were made by the trial court and affirmed by the court of appeals:

a. The open fields doctrine does not permit a search of personal effects or of a commercial structure in a field. No known reported case has ever allowed such a search. 808 F.2d at 1185.

b. The trial court made a specific factual finding that the disputed statutory scheme did not create a pervasively regulated industry nor did the beekeeping industry have a long history of close regulation in Ohio. Id. at 1187.

c. The bee inspection statute provides too much discretion [to the inspector] and did not provide certainty, regularity or fairness. Id. at 1188.

d. Appellees had a *subjective expectation* of privacy. The Appellants-defendants failed to establish that such expectation was unreasonable. Id. at 1185.

In analyzing this case, the Court of Appeals for the Sixth Circuit, before invoking the fourth amendment, determined whether or not a search had occurred. *Dow Chemical Co. v. United States,* 749 F.2d 307, 311 (6th Cir. 1984), aff'd. — U.S. —, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). While appellants argued that the open fields doctrine of *Oliver v. United States,* 466 U.S. 170 (1984) applied, the court of appeals found that appellants' reliance on *Oliver* was misplaced. *Allinder v. Ohio,* 808 F.2d 1180, 1184 (1987).

The court of appeals held that *Oliver* did not overrule the holding in *Katz v. United States,* 389 U.S 347 (1967), that the fourth amendment protects persons and not places. The court of appeals stated that *Oliver* focused on factors such as the "intention of the Framers of the Fourth Amendment", the uses to which a location is put and the societal understanding as to areas deserving protection from government invasion in concluding that society does not recognize an expectation of privacy in open fields as reasonable. *Oliver,* at 178-79.

In decisions following *Katz,* this Court has consistently adhered to the open fields doctrine while at the same time recognizing that it is limited in scope to "sights seen in 'the open fields.'" *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.,* 416 U.S. 861 (1974)

Similarly, in *Maine v. Thornton,* 466 U.S. 170 (1984), a case consolidated with *Oliver,* the officers making a visual inspection of fields spotted marijuana growing, but they

obtained a search warrant before they seized the marijuana. 466 U.S. at 174.

In *Maine,* this Court also distinguished the fourth amendment protection afforded to "effects" by limiting the term "effect" to personal rather than real property. Id. at 177 n 7.

More recently, in *Dow Chemical Co. v. United States, supra,* this Court applied the open fields doctrine to uphold the aerial observation and photography of the industrial plant complex. This Court did acknowledge that the defendant in the *Dow* case had a legitimate expectation of privacy from unreasonable government entries into its covered buildings and private commercial property while emphasizing that the observation took place "without physical entry", and that any such entry would raise "significantly different questions." 106 S.Ct. at 1825-26 (emphasis in original).

Limitations On Open Fields

There is no case where the open fields doctrine has been applied to allow a warrantless nonconsensual search of personal effects or of a commercial structure *in a field.* As a result, the appellants' attempt to extend the holding in *Oliver* beyond the open fields exception and into the realm of structures as presented in this case, must fail. As the Court of Appeals for the Sixth Circuit stated:

> To so extend the open fields exception, we would have to ignore a long line of Supreme Court cases which have extended fourth amendment protection to areas other than the home and its curtilage. Cf *Donovan v. Dewey,* 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262

1981) (stone quarry); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (luggage); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct 1942, 56 L.Ed.2d 486 (1978) (store); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct 1816, 56 L.Ed.2d 305 (1978) (employee working area of business premises); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) (office); *United States v. Chadwick*, 433 U.S. 1, 538, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (footlocker); *Mancusi v. DeForte*, 392 U.S 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L Ed.2d 943 (1967) (locked commercial warehouse)

Allinder, 808 F.2d at 1185.

Inspections authorized by O.R.C. Section 909.05, and the inspections to which appellees object here, do not involve a mere visual inspection of apiaries in an open field. Rather, the disputed statute allows a warrantless inspection of "any premises, buildings, or any other place, public or private, in which [the Director of Agriculture of his authorized representatives have] reason to believe that bees, honey, wax, used hives, or used appliances are kept," except "occupied dwelling(s)." Thus, for example, it allows for an entry into any commercial structure where bee equipment is stored.

As this Court has explained, while the government may observe, without a warrant, whatever is observable by the public, areas where only employees are permitted are not "thrown open . . . to the warrantless scrutiny of Government agents." *Barlow's, Inc.*, 436 U.S. at 315. [R]easonableness is still the ultimate standard." Id. (quoting *Camara v. Municipal Court*, 387 U.S 523, 539 (1967).

The Court of Appeals for the Sixth Circuit further stated:

> Nor can the warrantless physical intrusion, manipulation and dismantling of the hives themselves be sanctioned by the visual inspection allowable under the open fields doctrine. Apiaries are commercial property. They are also personal property since they are movable and at times are moved for rental to farmers in crop pollination. As such they fall within the definition of effects in *Oliver*, 466 U.S. at 177 n. 7, 104 S.Ct. at 1740 n. 7, and are therefore expressly afforded protection by the fourth amendment . . .
>
> The apiaries are "effects" and as such are part of plaintiffs' commercial personal property. We conclude that the physical intrusion, manipulation and dismantling of the hives by a state inspector constitutes a search under the fourth amendment.

Allinder, 808 F.2d at 1186.

For nearly two decades, the Supreme Court has followed the general rule that a warrant is required before conducting an administrative search of commercial property or commercial products. *See v. City of Seattle*, 387 U.S. at 544-45. In *See*, this Court concluded that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." 387 U. S. at 544.

Later decisions have limited this rule so that the fourth amendment does not prohibit all such searches, but only those that are unreasonable. *Donovan*, 452 U.S. at 599. In *Donovan*, this Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the Fourth Amendment. The Sixth Circuit has characterized these exceptions under the ra-

tionale of "the notion of implied consent." *Dow Chemical Co.*, 749 F.2d at 311 n.1; *see also, Barlow's, Inc.*, 436 U S. at 313. However, since this form of search is an exception to the warrant requirement, the burden of proof rests with the party [the appellants in this case] asserting the exception. *See Barlow's, Inc.*, 436 U.S. at 324.

Further, an exception to the warrant requirement exists for "closely regulated industries long subject to inspection" and for "pervasively regulated" businesses, *Barlow's, Inc.*, 436 U S. at 313, for which, because of the nature of the regulation, no reasonable expectation of privacy exists. *Cf. Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (Premises of retail dealer in liquor); *United States v. Biswell*, 406 U.S. 311 (1972) (pawn shop).

The district court and court of appeals in this case determined the statute involved herein does not pervasively regulate the beekeeping industry. *Allinder v. Ohio*, 808 F.2d at 1187.

In *Donovan*, 452 U.S. at 604, this Court acknowledged another exception to the warrant requirement by indicating a warrantless search is permissible if a statute "establishe(s) a predictable and guided federal regulatory presence." *See also Dow Chemical*, 749 F.2d at 311 n. 1. The court of appeals determined that said regulatory scheme did not exist in this case. 808 F.2d at 1187.

The appellants also raised the administrative burden which requiring warrants would place on them. The trial court rejected this argument based upon a rejection of the same argument in *Barlow's, Inc.*, 436 U.S. 307.

Finally, appellants utilize business competitors of the beekeepers whom they inspect. The lower courts concluded that the requirement of a warrant was necessary to protect appellees herein. *Allinder,* 808 F.2d at 1188. The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *Barlow's, Inc.,* at 312.

—o—

CONCLUSION

In summary, this appeal should be dismissed. Appellants have failed to present a proper question for appeal pursuant to 28 U.S.C. Section 1254(2). Similarly, the appellants lack standing to assert the question presented in their jurisdictional statement. Moreover, the appellants seek review by this Court of an interlocutory decision. The strict construction of Section 1254(2) consistently applied by this Court mandates that this appeal be dismissed.

Finally, appellants have failed to present a substantial question for review by this Court regardless of whether their jurisdictional statement is treated as an appeal or a petition for a writ of certiorari. The lower courts' decisions in this case are consistent with long established precedent. No purpose would be served by a plenary review of this case. Consequently, the appeal should be dismissed or, alternatively, the decision of the United

States Court of Appeals for the Sixth Circuit should be summarily affirmed.

Respectfully submitted,

ARNOLD & BARRETT
*Gregory L. Arnold
David C. Barrett, Jr.
**Counsel of Record and Attorneys for Appellees*
425 Jefferson Avenue
Suite 804
Toledo, Ohio 43604

Supreme Court, U.S.
FILED
MAY 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-1649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF OHIO; THE OHIO DEPARTMENT OF AGRICULTURE; DALE LOCKER, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE; ERIC NELSON, HARDIN COUNTY BEE INSPECTOR,

Appellants,

v.

WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER d/b/a SUNNYSIDE BEE FARM; ELMER STEINER AND MARILYN L. STEINER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

PETER D. PATITSAS
Assistant Attorney General

* **PATRICK ANDREW DEVINE**
Assistant Attorney General

State Office Tower, 10th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2980

* **COUNSEL OF RECORD FOR APPELLANTS**

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ..... -ii-

1. AN APPEAL FROM THE DECISION BELOW IS PROPER SINCE THE DECISION OF THE COURT OF APPEALS IS A FINAL ORDER. IN THE ALTERNATIVE, THE COURT MAY CONSIDER THIS APPEAL AS A PETITION FOR CERTIORARI 1

2. THE APPELLANTS HAVE STANDING AND THEY HAVE PERFECTED A PROPER APPEAL TO THIS COURT 3

3. THE QUESTION PRESENTED IS SUBSTANTIAL 5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases: **Pages:**

Calder v. Jones,
465 U.S. 783 (1984) 3
City of New Orleans v. Dukes,
427 U.S. 297, 301 (1976) 1, 2
Doran v. Salem Inn, Inc.,
422 U.S. 922, 927 (1975) 3
El Paso v. Simmons,
379 U.S. 497, 501-03 (1965) 3
Illinois v. Krull,
481 N.E. 2d 703 (1985),
cert. granted 106 S. Ct. 1456 (1986) 5
New York v. Burger,
493 N.E. 2d 926 (1986)
cert. granted 107 S. Ct. 61 (1986) 5
Thornburgh v. American College of Obstetricians and Gynecologists
106 S. Ct. 2169, 2176 (1986) 2

Statutes:
Ohio Revised Code §909.05 ..... 1, 2
28 U.S.C. §2103 ..... 2, 3
28 U.S.C. §1254(2) 1, 2

Other Authorities:
Rule 15.1(a) of the Rules of the
Supreme Court of the United States 4
Stern, Gressman and Shapiro, *Supreme Court Practice*, §2.2 (6th Ed. 1986) 3

GROUNDS FOR PLENARY CONSIDERATION

1. AN APPEAL FROM THE DECISION BELOW IS PROPER SINCE THE DECISION OF THE COURT OF APPEALS IS A FINAL ORDER. IN THE ALTERNATIVE, THE COURT MAY CONSIDER THIS APPEAL AS A PETITION FOR CERTIORARI.

The United States Court of Appeals for the Sixth Circuit has made a final determination that Ohio Revised Code ("ORC") §909.05 is unconstitutional in that it authorizes nonconsensual warrantless inspections of apiaries. Although the appellees herein have initiated several constitutional challenges of other related statutory provisions, the appellees have made no further constitutional challenges to ORC §909.05.

This Court's decision with regard to the warrant requirement for conducting administrative inspections of apiaries would be dispositive of other issues pending in the courts below. Appellees have argued that the Ohio Department of Agriculture must provide notice to apiary owners prior to the time a warrant is sought and again prior to the time such a warrant is executed. These issues have been briefed in the federal district court, but further consideration has been stayed pending this Court's determination with regard to the requirement of a warrant. If this Court determines that a warrant is not required to inspect an apiary, these other pending issues will become moot.

Further, there is some question whether the finality requirement applies to all appeals brought pursuant to 28 U.S.C.§1254(2). In *City of New Orleans v. Dukes,* 427 U.S. 297, 301 (1976), this Court stated in pertinent part:

> There may be some question as to the continuing vitality of the finality requirement in the context of §1254(2), which unlike such jurisdictional statutes as 28 U.S.C. §1257 and 28 U.S.C. §1291 has no 'finality' provision in the statute itself.

A recent U.S. Supreme Court decision has provided guidance with regard to the finality requirement where there are further factual disputes to be resolved. The Court stated the following in *Thornburgh v. American College of Obstetricians and Gynecologists,* 106 S. Ct. 2169, 2176 (1986):

> . . . where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under §1254(2).

In the present case, there are no additional facts which must be developed in order to determine the constitutionality of ORC §909.05. Accordingly, this Court's jurisdiction over the instant appeal is proper.

Assuming arguendo that the appeal is not proper in this case, the Court may consider the jurisdictional statement as a petition for certiorari. 28 U.S.C. §2103 provides in pertinent part:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States Court of Appeals, in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ

> of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . .

On numerous occasions this Court has dealt with the finality question by treating the appeal as a petition for certiorari and then granting certiorari. *El Paso v. Simmons*, 379 U.S. 497, 501-03 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *Calder v. Jones*, 465 U.S. 783 (1984). This approach to the finality problem has been utilized because there is no finality requirement for a petition for certiorari. *See* Stern, Gressman and Shapiro, *Supreme Court Practice*, §2.2 (6th Ed. 1986).

Accordingly, the question of finality is merely academic in the present case. The Court should consider the important issue presented either in the context of an appeal or in the context of a petition for certiorari.

2. THE APPELLANTS HAVE STANDING AND THEY HAVE PERFECTED A PROPER APPEAL TO THIS COURT.

The instant appeal was brought by the State of Ohio; the Ohio Department of Agriculture; Dale Locker, Director of the Ohio Department of Agriculture; and Eric Nelson, Hardin County Bee Inspector. All four appellants have standing because they have a direct interest in upholding the constitutionality of ORC §909.05, inasmuch as they are involved in implementing its provisions and since they have been restrained from carrying out its implementation. Although the United States Court of Appeals for the Sixth Circuit has remanded the case to the district court with instructions to dismiss the State of Ohio and the Ohio Department of Agriculture as defendants, the district

court has not yet issued its order of dismissal. Accordingly, all four appellants have standing to appeal the decision below.

Assuming arguendo that Dale Locker, the Director of the Ohio Department of Agriculture, and Eric Nelson, a Hardin County bee inspector, are the only appellants with standing to pursue the instant appeal, these two appellants have perfected a proper appeal to this Court. The question presented by their Jurisdictional Statement does address their interest in the appeal.

Although the question presented refers expressly to the prohibition against the "State", a prohibition against the state is a prohibition with regard to a director of a state department and an employee of a state in their work for the state. Rule 15.1(a) of the Rules of the Supreme Court of the United States provides in pertinent part:

> . . . The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. . .

A subsidiary question of whether a state is prohibited from conducting nonconsensual, warrantless administrative inspections is whether state employees are prohibited from conducting such inspections. This is true since a state can act only through its agents and employees. To say that a state is prohibited from taking certain action has no meaning if the state's agents and employees are not bound by such prohibition. Although the State of Ohio and the Ohio Department of

Agriculture will be dismissed as defendants in the court below, the inspections at issue are still state inspections carried out by state employees pursuant to a heretofore valid state statute.

In view of the foregoing, the appellants herein have standing and they have presented a proper statement of the issue.

3. THE QUESTION PRESENTED IS SUBSTANTIAL.

The most clear indication that the issues presented in this case are substantial is this Court's decision to grant certiorari in two other cases pertaining to statutes permitting warrantless administrative inspections. Both *New York v. Burger*, 493 N.E.2d 926 (1986), cert. granted 107 S. Ct. 61 (1986), and *Illinois v. Krull*, 481 N.E.2d 703 (1985), cert. granted 106 S. Ct. 1456 (1986) are important cases presently pending before this Court. The plenary consideration of the instant appeal will help further clarify the law evolving in the area of warrantless inspections and searches.

Further, the question presented is substantial in that its resolution has the potential to revolutionize the apiary inspection process throughout most of the country. At present, few if any states have been saddled with the requirement of a warrant or consent to inspect apiaries. Such requirement would create an undue burden on an inspection process which has worked well for almost 75 years in some states. It is important to note that the inspection of apiaries is essential in maintaining a bee population free from disease. Without bees it is impossible to pollinate trees and crops.

In short, the issues presented for review are substantial in that their resolution will provide clear guidance to numerous states and federal agencies which conduct administrative inspections.

CONCLUSION

In view of the foregoing, the Court should note probable jurisdiction of this appeal and set it for argument.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

PETER D. PATITSAS
Assistant Attorney General

* **PATRICK A. DEVINE**
Assistant Attorney General

State Office Tower, 10th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2980

* **COUNSEL OF RECORD FOR APPELLANTS**

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief have been sent by regular U.S. mail this _____ day of May, 1987 to: Gregory L. Arnold, Arnold and Barrett, Suite 804, Secor Building, 425 Jefferson Avenue, Toledo, Ohio 43604.

PATRICK A. DEVINE
Assistant Attorney General